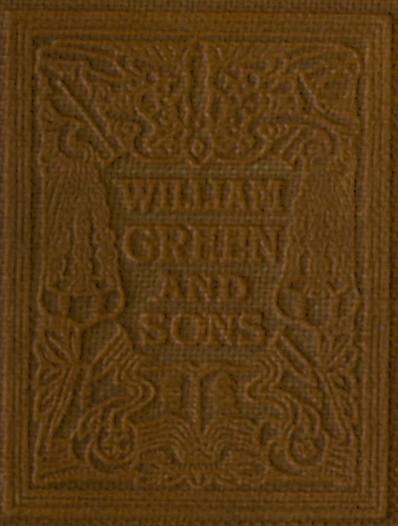

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ENCYCLOPÆDIA

OF THE

LAWS OF ENGLAND

VOLUME I

This edition has been prepared under the general editorship of MAX. A. ROBERTSON, Esq., of the Inner Temple and the Midland Circuit, Barrister-at-Law.

Printed by William Green & Sons, *Edinburgh*

July 1906

Law.
E565.2

ENCYCLOPÆDIA

OF THE

LAWS OF ENGLAND

WITH FORMS AND PRECEDENTS

BY THE

MOST EMINENT LEGAL AUTHORITIES

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VOLUME I

ABANDONMENT TO *BANKER*

WITH A GENERAL INTRODUCTION BY SIR F. POLLOCK, BART.

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A. (a.) B. (b.)	A. front, B. back of a leaf
Abr. Ca. Eq.	Abridgment of Cases in Equity
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Acc. or Agr. .	Accord or agrees
Act. . . .	Acton's Reports, Prize Causes
Act. Can. . .	Acta Cancellariæ, by Monro
Act. Reg. . .	Acta Regia
Ad. & E. . .	Adolphus and Ellis's Reports, K. B.
Ad. & E.N.S.	Adolphus and Ellis's K. B., New Series
Add. E. R. .	Addams's Ecclesiastical Reports
A. & H. . .	Arnold and Hodges' Q. B. Reports
Adm. . . .	Admiralty
Al. & Nap. .	Alcock and Napier, K. B., Ireland
Alc. Reg. C. .	Alcock's Registry Cases, Ireland
Aleyn . . .	Aleyn's K. B.
Amb. . . .	Ambler's Reports, Chancery
And. . . .	Anderson's Reports, C. P.
Andr. . . .	Andrew's Reports, K. B.
Anst. . . .	Anstruther's Reports, Exch.
A. P. B. . .	Ashurst J., Paper Book
App. Cas. .	Appeal Cases
A. R. . . .	Anno Regni
Anon. . . .	Anonymous
Arch. Abr. P. L.	Archbold's Poor Law Cases
Arms. M. & O.	Armstrong, Macartney, and Ogle's Reports, N. P., Ireland
Arn. . . .	Arnold's Reports
Arn. & H. Q. B.	Arnold and Hodges, Q. B.
A. S. or Act of Sederunt	Act of Sederunt, Court of Session
Asp. . . .	Aspinall's Maritime Cases
Ass. . . .	Book of Assize
Ast. Ent. . .	Aston's Entries
Atk. . . .	Atkyn's Reports, Chancery
Aust. . . .	Austin's County Court Cases
Auth. . . .	Authentica
B. & B. . .	Broderip and Bingham's Reports, C. P.
B. & S. . .	Best and Smith's Reports, Q. B.
B. D. & O. .	Blackham, Dundas, and Osborne, N. P., Ireland
B. & L. . .	Browning and Lushington's Admiralty Reports
B. P. B. . .	Paper Book of Buller
B. R. . . .	King's Bench
Bac. Abr. .	Bacon's Abridgment
Ball & B. . .	Ball and Beatty's Reports, Chancery, Ireland
Banc. Sup. .	Upper Bench
Bar. & Arn. .	Barron and Arnold's Election Cases
Bar. & Aust.	Barron and Austin's Election Cases
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Barn. & Adol.	Barnewall and Adolphus's Reports, K. B.
Barn. & Cress.	Barnewall and Cresswell's Reports, K. B.
Barn. K. B. .	Barnardiston's Reports, K. B.
Barn. Ch. .	Barnardiston's Reports, Chancery
Barnes . .	Barnes's Notes, C. P.
Batt. . . .	Batty's Reports, K. B., Ireland
Beat. . . .	Beatty's Chancery Reports, Ireland
Beav. . . .	Beavan's Reports, Rolls Court
Beav. & Wal.	Beavan and Walford Parly. Cases
Bel. . . .	Bellewe's Reports, K. B.
Bel. App. . .	Bell's Cases on Appeal from Scotland
Bell's C. C. .	Bell's Crown Cases
Belt Sup. . .	Belt's Supplement to Vesey, senr.
Benl. . . .	Benloe or Bendloe's Reports, K. B.
Benl. & Dal.	Benloe and Dalison's Reports, C. P.
Bern. Church Cas.	Bernard's Church Cases, Ireland
Bing. . . .	Bingham's Reports, C. P.
Bing. N. C. .	Bingham's New Cases, C. P.
Bittl. Chamb. Rep.	Bittleston's Chambers Reports
Bittl. Prac. Cas.	Bittleston's Practice Cases
Bky. & Insol. Cas.	Bankruptcy and Insolvency Cases
Black. J. P. Cas.	Blackerby's Justice of the Peace Cases
Black. W. .	Sir Wm. Blackstone's Reports, K. B.
Black. H. .	Henry Blackstone's Reports, C. P.
Bli. . . .	Bligh's Reports, House of Lords

Bli. N. S.	Bligh's Reports, New Series
Bos. & Pul.	Bosanquet and Puller's Reports, C. P.
Bos. & P. N. R.	Bosanquet and Puller's New Reports, C. P.
Bott P. L. Cas.	Bott's Poor Law Cases
Br. Brev. Jud.	Brownlow Brevia Judicialia, etc.
Br. Eccl.	Brooke's Ecclesiastical Cases
Br. N. C.	Brooke's New Cases, K. B.
Brac. N. B.	Bracton's Note Book
Bridg. J.	Bridgman's (J.) Reports, C. P.
Bridg. O.	Orlando Bridgman's Reports, C. P.
Bro. Ab.	Brooke's Abridgment
Bro. Ent.	Brown's Entries
Bro. C. C.	Brown's Chancery Reports (Eden or Belt)
Bro. P. C.	Brown's Parliament Cases
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Brownl.	Brownlow and Goldsborough's Reports, C. P.
Buck	Buck's Reports in Bankruptcy
Bull. N. P.	Buller's Nisi Prius
Bulst.	Bulstrode's Reports, K. B.
Bunb.	Bunbury's Reports, Ex.
Burr.	Burrow's Reports, K. B.
Burr. S. C.	Burrow's Settlement Cases
C. B.	Common Bench Reports, or Manning, Granger, and Scott's Reports
C. B. N. S.	Common Bench Reports, New Series
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C. M. & R.	Crompton's Meeson and Roscoe's Reports, Ex.
C. P.	Common Pleas
C. P. D.	Law Reports, Common Pleas Division
C. Theod.	Codex Theodosiani
Ca.	Case, or Placita
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Ca. *temp.* H.	Cases time Hardwicke, K. B.
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Calth.	Calthrop's Reports, K. B.
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Gif. . . . Giffard's Reports, Chancery
Gilb. Eq. . . Gilbert's Cases in Law and in Equity
„ Ch. . . „ Reports, Chancery
Glanv. . . . Glanville Election Cases
Glasc. . . . Glascock's Reports in all the Courts, Ireland
Godb. . . . Godbolt's Reports, K. B.
Godol. . . . Godolphin
Golds. . . . Goldsborough's Reports, K. B.
Good. Pat. Cas. Goodeve's Patent Cases
Gow . . . Gow's Nisi Prius Cases
Grif. . . . Griffith's Poor Rate Cases
Grif. Pat. Cas. Griffin's Patent Cases
Gwm. . . . Gwillim's Tithe Cases

H. & C. . . Hurlstone and Coltman's Reports, Ex.
H. & N. . . Hurlstone and Norman's Reports, Ex.
H. L. . . . House of Lords
H. P. C. . . Hale's Pleas of the Crown
H. & R. . . Harrison and Rutherford's Reports, C. P.
Ha. & Tw. . Hall and Twells's Chancery Reports
Had. . . . Earl of Haddington's Reports, Court of Session
Hag. Adm. . Haggard's Admiralty Reports
Hag. Con. . Haggard's Consistory Reports
Hag. Ec. . . Haggard's Ecclesiastical Reports
Hans. . . . Hansard's Entries
Har. & W. . Harrison and Wollaston's Bail Reports
Hard. . . . Hardres' Reports, Ex.
Hare . . . Hare's Reports, Chancery
Hawk. P. C. . Hawkins' Pleas of the Crown
Hay & M. . Hay and Marriott's Admiralty Reports
Hayes . . . Hayes's Reports, Exchequer, Ireland
Hayes & J. . Hayes and Jones's Reports, Exchequer, Ireland
Hem. & M. . Hemming and Miller, Chancery
Het. . . . Hetley's Reports, C. P.
Hil. . . . Hilary Term
Hob. . . . Hobart's Reports, K. B.
Hod. . . . Hodge's Reports, Common Pleas
Hog. . . . Hogan's Reports, Rolls, Ireland
Holt . . . Holt's Reports, K. B.
Holt Eq. . . Holt's Equity Reports
Holt N. P. . Holt's Nisi Prius Reports
Hop. & C. . Hopwood and Coltman, Registration Appeal Cases
Hop. & P. . Hopwood and Philbrick, Registration Appeal Cases
Horn & H. . Horn & Hurlstone's Exchequer Reports
Hov. Suppl. . Hovenden's Supplement to Vesey, jun.
How. St. Tr. Howell's State Trials
Hud. & B. . Hudson and Brooke's Reports, K. B., Ireland
Hugh. . . . Hughes's Entries
Hunt . . . Hunt's Annuity Cases
Hurl. & W. . Hurlstone & Walmsley Exchequer Reports
Hut. . . . Hutton's Reports, C. P.

I. R. Eq. . . Irish Reports, Equity Series
In F. . . . *In fine.* At the end of a title, law, or a paragraph
In Pr. . . . *In principio.* In the beginning, and before the first paragraph of a law
Ins. . . . Insurance
Ind. App. . Law Reports, Indian Appeals
Ind. App. Supp. Law Reports, Supplemental Indian Appeals
Ir. Jur. . . Irish Jurist
Ir. Ch. . . Irish Chancery Reports
Ir. Com. L. . Irish Common Law Reports
Ir. Eq. . . Irish Equity Reports
Ir. L. . . . Irish Law Reports

Ir. L. Rec.	Irish Law Recorder
Ir. L. T.	Irish Law Times
Ir. R. C. L.	Irish Reports, Common Law Series
Ir. R. Eq.	Irish Reports, Equity Series
Ir. Reg. App.	Irish Reports, Registry Appeals
J. Ctus.	Jurisconsultus
J. P.	Justice of the Peace Periodical
Jac.	Jacob's Reports, Chancery
Jac. & W.	Jacob and Walker's Reports, Chancery
Jebb C. C.	Jebb's Crown Cases, Ireland
Jebb & B.	Jebb and Bourke's Reports, K. B., Ireland
Jebb & S.	Jebb and Symes' Reports, K. B., Ireland
Jenk.	Jenkins's Reports, Ex.
John.	Johnson's Reports, Chancery
John. & H.	Johnson and Hemming's Reports, Chancery
Jones T.	Jones's Reports, K. B.
Jones W.	Jones's Reports, K. B.
Jones Ex.	Jones's Reports, Exch., Ireland
Jones & C.	Jones and Carey's Reports, Exch., Ireland
Jo. & Lat.	Jones and Latouche's Reports, Chancery, Ireland
Jud.	Judgments, First and Second Book of
Jur.	The Jurist Reports in all the Courts
Jur. N. S.	Jurist, New Series
K. B.	King's Bench
K. & G. R. C.	Keane and Grant's Registration Cases
Kay	Kay's Reports, Chancery
Kay & J.	Kay and Johnson's Reports, Chancery
Keb.	Keble's Reports, K. B.
Keen	Keen's Reports, Rolls Court
Keilw.	Keilway's Reports, K. B.
Kel.	Sir John Kelyng's Reports, K. B.
Kel. W.	Wm. Kelyng's Rep., 2 parts, Chancery
Ken. Ld.	Kenyon's Reports, K. B.
Keny.	Kenyon's Notes, by Hanmer, K. B.
Kn.	Knapp's Reports, Privy Council
Kn. & O.	Knapp and Ombler, Election Cases
L. & G. *temp.* Sugden	Lloyd and Goold *temp.* Sugden, Chy., Ireland
L. & C.	Leigh and Cave, Crown Cases
L. & G. *temp.* Plunk.	Lloyd and Goold, *temp.* Plunkett, Chy., Ireland
L. J.	Law Journal, Reports in all the Courts
L. M. & P.	Lowndes, Maxwell and Pollock's Rep., Bail Court
L. & P.	Lowndes & Pollock
L. P. B.	Paper Book of Lawrence, J.
L. Rev.	The Law Review
L. T.	The Law Times, Reports in all the Courts
L. & Welsb.	Lloyd and Welsby's Commercial Reports
La.	Lane's Reports, Exchequer
Land Com. Rep.	Land Commission Reports, Ireland
Lat.	Latch's Reports, K. B.
Law Mag.	Law Magazine
*L. R. Ad. & Ec.	Admiralty and Ecclesiastical
*L. R. C. C.	Crown Cases Reserved
*L. R. Ch.	Chancery Appeal Cases
*L. R. C. P.	Common Pleas Cases
*L. R. Eq.	Equity Cases
*L. R. Ex.	Exchequer Cases
*L. R. H. L.	English and Irish Appeal Cases, House of Lords
*L. R. H. L. Sc.	Scotch and Divorce Appeal Cases, House of Lords
*L. R. P. C.	Privy Council Appeal Cases
*L. R. P. & D.	Probate and Divorce
*L. R. Q. B.	Queen's Bench Cases
L. R. Ir.	Law Reports, Ireland
Leg. Ex.	Legal Examiner
Leg. O.	The Legal Observer
Leach	Leach's Crown Cases
Lee. *t.* Hard.	Lee's Cases, *temp.* Hardwicke, K. B.
Lee Eccl.	Lee's Ecclesiastical Reports
Leon.	Leonard's Reports, K. B.
Lev.	Levinz's Reports, K. B.
Lew. C. C.	Lewin's Crown Cases
Ley.	Ley's Reports, K. B.
Lib. Ass.	Liber Assisarum Year Book, pt. 5
Lib. Feud.	Liber Feudorum, usually printed at the end of the Corpus Juris Civilis
Lib. Int.	Liber Intrationum
Lib. Intr.	Old Book of Entries
Lib. Reg.	Register Book
Lil.	Lilly's Reports
Lil. Abr.	Lilly's Practical Register
Lit.	Littleton's Reports, C. P.
Lit. with S.	Littleton, S. for Section
Lofft	Lofft's Reports, K. B.
Long Quinto	Year Book, pt. 10, K. B.
Longf. & T.	Longfield's and Townsend's Reports, Exch., Ireland
Lud. E. C.	Luder's Election Cases
Lum.	Lumley's Poor Law Cases

* In citing the Law Reports up to 1875, the number of the volume is placed after the letters L. R., thus:—L. R. 3 H. L. From 1876 to 1890, they are cited thus:—2 Q. B. D. Since 1890, the year has been placed in brackets:—[1894] 1 Ch.

Lush. . . . Lushington's Admiralty Reports
Lut. . . . Lutwyche's Reports, C. P.
Lut. R. C. . Lutwyche's Registration Cases

M. C. . . . Magistrates' Cases (Law Journal)
M. D. & D. G. Montagu, Deacon, and De Gex's Reports, Bankruptcy
M. & McA. . Montagu and McArthur's Reports, Bankruptcy
M. & Ayr. R. Montagu and Ayrton's Reports, Bankruptcy
M. & S. . . Maule and Selwyn's Reports, K. B.
Mac. & G. . Macnaghten and Gordon's Reports, Chancery
Macn. . . . Macnaghten's Select Cases
Macr. & H. . Macrae and Hertslet's Insolvency Cases
Macr. P. C. . Macrory's Patent Cases
Macl. & R. . Maclean and Robertson's Scotch Appeals
Macq. H. L. Cas. Macqueen's Scotch Appeal Cases
Madd. . . . Maddock's Reports, Chancery
Madd. & G. . Maddock and Geldart's Reports (Madd. vol. 6)
Madd. Ch. . Maddock's Chancery Practice
Man. . . . Manning's Revision Cases
Man. & G. . Manning and Granger's Reports, C. P.
Man. & R. K. B. Manning and Ryland's Reports, K. B.
Man. & R. M. C. Manning and Rylands, Magistrates' Cases
Manson . . Manson's Bankruptcy and Company Cases
Mar. . . . March's Reports, K. B.
Mars. Adm. . Marsden's Admiralty Cases
Marsh. . . Marshall's Reports, C. P.
McCle. . . McCleland's Reports, Ex.
McCle. & Yo. McCleland's and Young's Reports, Ex.
M'Dev. . . M'Devitt's Land Reports, Ireland
Mee. & W. . Meeson and Welsby's Reports, Ex.
Meg. . . . Megone's Company Cases
Mer. . . . Merivale's Reports, Chancery
Milw. . . . Milward's Reports, Irish Ecclesiastical
Mo. . . . Moore's Reports, K. B.
Mod. Ca. . . Modern Cases
Mod. Ent. . Modern Entries
Mod. Int. 1, 2 Modus Intrandi, 1, 2
Mod. Rep. . Modern Reports, K. B.
Mol. . . . Molloy's Chancery Reports, Ireland
Mont. & B. . Montagu and Bligh's Reports, Bankruptcy
Mont. & Chit. Montagu and Chitty's Reports, Bankruptcy
Mont. B. C. . Montagu's Reports, Bankruptcy

Moo. C. C. . Moody's Crown Cases
Moo. & M. . Moody and Malkin's Reports, N. P.
Moo. P. C. . Moore's Privy Council Cases
Moo. P. C., N. S. Moore's Privy Council Cases, New Series
Moo. Ind. Ap. Moore's India Appeals
Moo. & R. . Moody and Robinson's Reports, N. P.
Moo. K. B. . J. B. Moore's Reports, K. B.
Moo. & P. . Moore and Payne's Reports, C. P.
Moo. & S. . Moore and Scott's Reports, C. P.
Moo. C. P. . Moore's Common Pleas Reports
Mor. Bky. . Morrell's Bankruptcy Reports
Mos. . . . Moseley's Reports, Chancery
Murp. & H. . Murphy and Hurlstone's Exchequer Reports
Myl. & Cr. . Mylne and Craig's Reports, Chancery
Myl. & K. . Mylne & Keen's Reports

N. C. . . . Notes of Cases in the Ecclesiastical and Maritime Courts
Nels. . . . Nelson's Reports, Chancery
Nev. & M. K. B. Neville and Manning's Reports, K. B.
Nev. & M. M. C. Neville and Manning's Magistrates' Cases
Nev. & P. K. B. Neville and Perry's Reports, K. B.
Nev. & P. M. C. Neville and Perry's Magistrates' Cases
New Rep. . New Reports in all the Courts
New Mag. Ca. New Magistrates' Cases, by Bittleston, etc.
New Sess. Ca. New Sessions' Cases, by Carrow, etc.
New Pr. Ca. . New Practice Cases
No. N. . . Novæ Narrationes
Nol. Sett. . Nolan's Settlement Cases
North. . . Northington's Reports, by Eden, Chancery
Noy . . . Noy's Reports, K. B.
N. R. . . . Not Reported
N. S. . . . New Series

O'M. & H. . O'Malley and Hardcastle's Election Cases.
Ord. Ch. . . Orders in Chancery
Ought. . . Oughton's Ordo Judiciorum
Ow. . . . Owen's Reports, K. B.

Pal. . . . Palmer's Reports, K. B.
Par. . . . Parker's Reports, Ex.
Paton . . . Paton's Appeal Cases, House of Lords
Pat. App. Ca. Paterson's Appeal Cases
P. C. . . . Privy Council
Pea. . . . Peake's Reports, N. P.
Peck. . . . Peckwell's Election Cases
Per. & Dav. . Perry and Davison's Reports, K. B.

Per. & K. . Perry and Knapp, Election Cases
Ph. Ch. . . Phillips's Reports, Chancery
Ph. Elect. . Phillip's Election Cases
Phillim. . . Phillimore's Reports, Ecclesiastical
Phillim. Ct. Ar. Phillimore's Reports, Court of Arches
Pig. & R. . . Pigott and Rodwell's Election Cases
Pl. Com. . . Plowden's Reports, K. B.
Pla. . . . Placita
Plac. Angl. Nor. Cases from William I. to Richard I.
Pol. . . . Pollexfen's Reports, K. B.
Poph. . . . Popham's Reports, K. B.
Pow. R. & D. Power, Rodwell, and Dew's Election Cases
P. R. C. P. . Practical Register in Common Pleas
Pr. Co. . . Prerogative Court
Pr. Reg. Ch. . Practical Register in Chancery
Pratt . . . Pratt's Cases on Contraband of War
Price Ex. . . Price's Reports, Exchequer
Pr. Notes . Price's Notes of Practice Cases
P. Wms. . . Peere William's Reports, Chancery

Q. . . . . Quorum
Q. Attach. . Quoniam Attachiamenta
Q. War. . . Quo Warranto
Quinti Quinto Year Book, 5 Hen. v.

R. . . . . The Reports
R. Comp. Ca. Reports of Compensation Cases
R. P. C. . . Reports of Patent Cases (Official)
R. R. . . . The Revised Reports
Rail. C. . . Railway Cases, Nicol, Hare, Carew, etc.
Rast. . . . Rastell's Entries and Statutes
Raym. (Ld.). Lord Raymond's Reports, K. B.
Ray. T. . . Sir Thomas Raymond's Reports, K. B.
Ray. Tithe Cas. Rayner's Tithe Cases
Real Prop. Cas. Real Property and Conveyancing Cases
Reg. Jud. . Registrum Judiciale
Rep. Ch. . . Reports in Chancery
Rick. & Saund. Rickards and Saunders' Locus Standi
Ridgw. Ap. . Ridgway's Appeals, Ireland
Ridg. *t.* Hard. Ridgway, *temp.* Hardwicke, Chancery
Ridg. L. & S. Ridgway, Lapp and Schoales's Reports, K. B., Ireland
Rob. . . . Robinson's Entries
Rob. C. . . Robinson's Reports Admiralty
Rob. Eccl. . Robertson's Ecclesiastical Reports
Robert. Ap. . Robertson's Appeal Cases, Scotland
Rob. W. . . Robinson's New Admiralty Reports
Rolle . . . Rolle's Reports
Rom. . . . Romilly's Notes of Cases
Rose . . . Rose's Reports, Bankruptcy
Rot. Cur. Reg. Rotuli Curiæ Regis
Rot. Parl. . Rotuli Parliamentorum
Rowe . . . Rowe's Interesting Cases, Ireland
Russ. . . . Russell's Reports, Chancery
Russ. & M. . Russell and Mylne's Reports, Chancery
Russ. & R. . Russell and Ryan's Crown Cases
Ry. F. . . . Rymer's Fœdera
Ry. & M. . . Ryan and Moody, N. P. Reports
Ry. & Can. Traf. Cas. Railway and Canal Traffic Cases, by Browne and Macnamara

S. § . . . Section
S. B. . . . Upper Bench
S. C. . . . Same Case
S. L. T. . . Scots Law Times
S. P. . . . Same Point or Principle
S. & Sm. . . Searle and Smith's Reports, Probate and Divorce
Saint . . . Saint's Registration Cases
Salk. . . . Salkeld's Reports, K. B.
Sau. & Sc. . Sausse and Scully's Reports, Rolls, Ireland
Saund. & C. . Saunders and Cole, Bail Court Reports
Saund. . . Saunders's Reports, K. B.
Sav. . . . Savile's Reports, C. P.
Say. . . . Sayers's Reports, K. B.
Scac. . . . Scaccaria Curia, Court of Exchequer
Sch. & Lef. . Schoale and Lefroy's Reports, Chancery, Ireland
Sco. . . . Scott's Report, C. P.
Sco. N. R. . Scott's New Reports, C. P.
Sel. Ca. Ev. . Select Cases relating to Evidence
Sel. Ca. *t.* King Select Cases, Chancery, *temp.* King
Sel. Coll. Ca. Select Collection of Cases, by a Solicitor
Seld. . . . Selden
Sess. Ca. . . Sessions Cases concerning Settlements
Sh. App. . . Shaw's Reports of Appeal Cases, House of Lords
Sh. & McL. . Shaw and Maclean's Reports of Appeal Cases, House of Lords
Show. . . . Shower's Reports, K. B.
Show. P. C. . Shower's Parliament Cases
Sid. . . . Siderfin's Reports, K. B.

Sim. & St. . Simons and Stuart's Reports, Chancery
Sim. . . . Simons's Reports, Chancery
Skin. . . . Skinner's Reports, K. B.
Sm. & G. . . Smale and Giffard's Reports, Chancery
Smi. & Bat. . Smith and Batty's Reports, K. B., Ireland
Smith . . . Smith's Reports, K. B.
Sm. L. C. . Smith's Leading Cases
Smith Reg. . Smith's Registration Cases
Smythe . . Smythe's Reports, C. P., Ireland
Sol. J. . . . Solicitors' Journal
Sp. Eccl. & Adm. Spink's Ecclesiastical and Admiralty Reports
Sp. Prize Ca. Spink's Prize Causes
Sp. & Sel. Ca. Special and Selected Law Cases
Star Ch. Ca. . Star Chamber Cases
Stark. N. P. . Starkie's Reports, N. P.
Still. . . . Stillingfleet's Ecclesiastical Cases
Stra. . . . Strange's Reports, K. B.
Sty. . . . Style's Reports, K. B.
St. Tri. . . State Trials
Swa. Ad. . . Swabey's Admiralty Reports
Sw. & Tr. . Swabey and Tristram's Reports, Probate and Divorce
Swans. . . Swanston's Reports, Chancery

T. L. R. . . Times Law Reports
T. & M. . . Temple and Mew's Criminal Appeal Cases
T. R. . . . Term Reports (Durnford and East), K. B.
Taml. . . . Tamlyn's Reports, Rolls
Taun. . . . Taunton's Reports, C. P.
Toml. . . . Tomlin's Election Reports
Toth. . . . Tothill's Reports, Chancery
Trin. . . . Trinity Term
Turn. . . . Turner
Turn. & R. . Turner and Russell's Reports, Chancery
Tyrw. . . . Tyrwhitt's Reports, Exchequer
Tyrw. & G. . Tyrwhitt and Granger's Reports, Exchequer

U. K. . . . United Kingdom

Vaugh. . . Vaughan's Reports, C. P.
Vent. . . . Ventris's Reports, K. B.
Ves. . . . Vesey's, Sen., Reports, Chancery
Ves. Jun. . Vesey's, Jun., Reports, Chancery
Ves. & Bea. . Vesey and Beames's Reports, Chancery
Vet. Entr. . Old Entries
Vern. . . . Vernon's Reports, Chancery
Vern. & S. . Vernon and Scriven's Reports, K. B., Ireland
Vid. . . . Vidian's Entries
Vin. Abr. . Viner's Abridgment

W. N. . . . Weekly Notes (Law Reports)
W. R. . . . Weekly Reporter in all the Courts
W. & S. Ap. . Wilson and Shaw's Reports, House of Lords
W. W. & D. . Willmore, Wollaston, and Davison's Reports, K. B.
W. W. & H. . Willmore, Wollaston, and Hodge's Reports, K. B.
Wallis. . . Wallis's Reports, Chancery, Ireland
Web. P. C. . Webster's Patent Cases
Welsh. . . Welsh Registry Cases, Ireland
West H. L. . West's Reports, House of Lords
West Ch. . . West's Reports, Chancery, *temp.* Hardwicke
Western . . Western's Tithe Cases
Wh. & T. L. C. White and Tudor's Leading Cases
Wight. . . Wightwicke's Reports, Exchequer
Wils. Ch. . Wilson's Chancery Reports
Wils. Ex. . . Wilson's Exchequer Reports
Wils. . . . Wilson's Reports, K. B.
Win. . . . Winch's Report's, C. B.
Willes. . . Willes's Reports, K. B. and C. P.
Wilm. . . . Wilmot's Notes and Opinions, K. B.
Wms. Saun. . Williams's Notes to Saunders's Reports
Wood . . . Wood's Decrees in Tithe Cases
Wolf. & B. . Wolferstan and Bristow's Election Cases
Wolf. & D. . Wolferstan and Dew's Election Cases
Woll. . . . Wollaston's Bail Court Reports

Y. B. . . . Year Book
Y. & C. Ex. . Younge and Collyer's Eq. Exch.
Y. & C. C. . Younge and Collyer's Chancery Cases
Y. & J. . . Younge and Jervis's Reports, Exchequer
Yelv. . . . Yelverton's Reports, K. B.
You. . . . Younge, Reports, Exchequer

GENERAL INTRODUCTION.

"*However, the following essay will do thus much good, viz.:—*

"*First, It will discover that it is not altogether impossible, by much attention and labour, to reduce the laws of England at least into a tolerable method of distribution.*

"*Secondly, It will give opportunity, both to myself and to others, as there shall occur new thoughts or opportunities, to rectify and to reform what is amiss in this, and to supply what is wanting.*". . .

Sir MATTHEW HALE.[1]

THE several titles of this Abridgment will set forth, with more or less detail, according to the nature and magnitude of the subject in hand, most, if not all, of the matters commonly recognised among English-speaking lawyers as forming distinct heads in the system of the common law, and being suitable for distinct treatment. In this Introduction it is proposed to attempt a general summary view of what is contained in the whole system; not of what might be expected in an ideal system of law, but of what the laws of England actually deal with. For this purpose the scientific merits of this or that arrangement are of less importance than conformity to general expectation and convenience. And if any one "tolerable method of distribution" of the matter of English law (to use Hale's words) were already sanctioned by authority, or commended by prevailing usage, I should not hesitate to follow it. But in fact no generally received method exists. Only two works purporting to give a general introduction to our law have attained a classical reputation, namely, the Commentaries of Blackstone and of Kent; and these differ materially from one another in scope and arrangement, while neither of them covers the whole field. It seems hardly credible at this day, though the fact is easily verified, that in Blackstone's plan contract finds a place only as one of twelve modes in which title to personal chattels can be acquired. Kent is more modern, but large departments of law have either been created or have become vastly more important even since Kent wrote. Stephen's Commentaries include much that Blackstone omitted, but the arrangement is only a little better. Many other schemes have been propounded by later authors, but almost always with a view to the philosophical analysis of law in general; and few of those authors have thought it needful to abstain from dividing or even scattering abroad in many places topics which English lawyers have long been accustomed to find together. Hence it seems that, if we are to make the attempt at all, we not only may, but must, act in the best way we can on our own responsibility.

[1] Preface to *An Analysis of the Civil Part of the Law.*

Scotland is fortunate in having a relatively compendious system, and institutional books which are modern enough to be at least fairly well arranged. Our fortune is yet to seek.

The most general category of law, without question, is Duty. Many legal duties have not any rights obviously corresponding to them, at any rate not any rights of determinate persons. But there are no rights apart from duties. Legal right is nothing else than the power to claim the performance or observance of duty. Without some kind of duty there can be no right, and nothing on which a court of justice can pass judgment. The laws of every country define and regulate the duties (that is, duties enforceable in courts of justice)[1] of all persons subject to them, and consequently the corresponding rights. When we speak of regulating as well as defining, we imply the existence of rules, or bodies of rules, distinct from those which lay down duties in the abstract. A mere enumeration of duties or rights would not be a working system of law. Such a system, to begin with, presupposes the existence of regular judicial tribunals, established in definite forms, and guided by settled principles beyond and apart from the specific rules governing this or that branch of law.

Coming to matters of less generality, but still highly general, we must know what persons are capable, or fully capable, of duties and rights; for not all human beings can be treated as equally capable (children, for example), even if artificial disabilities are discouraged to the utmost. Then the legal capacity of persons may be extended, as in agency and the formation of corporations. The general consequences which flow from the very nature of an artificial person, as distinct from the rules governing the constitution and powers of trading companies or other particular kinds of corporations, have to be considered here.

We may put on the same line with these fundamental notions a few of the most general rules and maxims, for example, the rule of responsibility for the acts of servants (a rule unfortunately so entangled with exceptions and counter exceptions as to form one of the most difficult branches of an English lawyer's learning), and the maxim that everyone is assumed to know the law. Then there are principles running through all or most parts of the law, though nowhere dealt with by authority as a whole, as to the extent to which the law takes account of a man's intention, motives, or disposition, of his knowledge or ignorance of facts, and of his success or failure in using due diligence. Whether these and the like matters, or some of them, would more conveniently be placed first or last in a complete exposition, is a question admitting of plausible reasons on either side; where to draw the line between the statement, with necessary illustration, of such principles and their application in special departments, appears to be a matter of literary judgment rather than of legal doctrine.

Again, we need auxiliary rules whereby we may know how rights and duties are created, acquired, transferred, and brought to an end. In a system so elaborate as our own, it is found that rules of this kind (such as the law of executors, or of vendors and purchasers) are not inferior in either bulk or importance to the primary rules whose application is guided by them. And they are dealt with, according to their importance, either separately or as accessory to particular branches

[1] Space does not allow us to consider the relation of positive law to moral rules; nor would it be useful for the purpose in hand.

of substantive law; not unfrequently, for reasons of convenience, in both ways. Practical workers want to find things grouped not only, nor chiefly, in a logical order, but more or less nearly as they occur in practice; nor will any real or supposed propriety of logical division reconcile them to being constantly sent from one book to another. Law does not consist of a number of self-contained and mutually exclusive propositions which can be arranged in a rigid framework.

A highly important auxiliary branch of law is that of construction. The rights and duties of individuals are largely dependent on the express declarations of the legislature, which are binding of their own force; of public officers and bodies authorised by the legislature to make binding rules of particular kinds; and last, by no means least, of private persons who can, within the limits set by the general law, make their own agreements and disposing acts a law for themselves, or those who have to claim through them. The question in what sense a conveyance, or a will, or a contract, is binding, occurs much oftener in practice than the question whether it is binding at all. In the case of an Act of Parliament, since its validity cannot be disputed in the High Court of Parliament itself or in any other court of justice, this is the only kind of question that can be raised. Some rules of construction are of very wide application, not counting the rules of grammar and common sense which have to be applied to the understanding of all human discourse. But special kinds of problems are presented by every distinct kind of operative document, and these are much more likely to cause real difficulty. Hence we find the construction of statutes, deeds, wills, mercantile instruments of the well-known kinds, and so forth, treated for the most part separately.

Closely connected with rules of construction, but of wider application, are the rules as to reckoning of time, distance, money, and the like. These, again, are commonly dealt with in English-speaking countries in a dispersed manner, as they occur in this and that particular branch of law. Whatever the conveniences of this usage may be, it certainly has the inconvenience of tending to produce a number of slightly different rules where one rule would have served as well.

When all these things have been accounted for, we are still only at the threshold of a working system of law. Legal duties may be ascertained, but even when they are too certain for discussion, they are not always fulfilled. There must be ways and means for the enforcement of duties and the satisfaction of just claims; in other words, law deals with remedies as well as rights. What form of redress is attainable is in many cases a far more practical question than whether any right has been violated. Many rules which appear hard at first sight are mitigated by the discretionary powers of judges to reduce punishment, and of juries to reduce their awards of damages, to slight or merely nominal amounts. On the other hand, many claims recognised as just are apt to bear but slender fruit of satisfaction to the parties entitled, by reason of the difficulties of various kinds that stand in the way of working out a complete remedy.[1] We do not speak here of difficulties of fact altogether external to the law, such as the insolvency of a debtor. The law can compel a fair division among creditors of what there is to

[1] People seem to think it scandalous whenever the law fails to do perfect justice; yet they constantly renounce the attempt in their own affairs, as when a travelling party makes a rough division of expenses rather than be at the pains of stating an exact account.

divide; it cannot make assets where there are none, or more assets than there are.

Then remedies are of divers kinds. The consequences of wrong-doing, default, or error (for many breaches of legal duty proceed not from wilful refusal to do right, nor even from negligence, but from honest errors of judgment), are different according as it is a case for punishment, or for redress to the person injured, or peradventure for both. Where there is a private redress, again, the consequences differ according as it takes the form of restitution or performance in kind, or of compensation in money. Where the original claim is merely for the payment of money, this last difference almost vanishes.[1]

The law of duties, rights, and remedies, together with the needful auxiliary rules, is often called substantive law by modern writers. When we have gone thus far, we are still a long way from having considered the whole of law. For it is not enough to know what is legal justice; we must know how to get justice done by the proper Court. The rules which fix the manner and form of administering justice are called rules of Procedure, or not unfrequently, by modern systematic writers, Adjective Law. Procedure—with which "practice" is sometimes synonymous—"denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the Court is to administer—the machinery as distinguished from its product."[2] In modern law, procedure tends more and more to become uniform; in many countries, including British India, civil and criminal procedure are embodied in special codes; and here the Rules of the Supreme Court are a code of civil procedure in everything but name. Where this stage has been attained, procedure is obviously best dealt with as a whole, and apart from the substantive law. But where many special forms of procedure exist, or formerly existed, in different Courts and different kinds of proceedings, they naturally have or had to be considered as attached to the particular subject-matter; and in an earlier stage what now seems to us the natural order was reversed, and the matter was rather annexed to the form than the form to the matter. "So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms."[3] This may be seen in any of our old books on pleading and practice, and in some that are not very old.

The law of evidence is, both in logic and in history, a branch of the law of procedure; but, for historical reasons, of which no statement can be attempted here,[4] it has taken an independent position in the common law, and, as treated by text-writers and indexers, has made large annexations not only from the rules of procedure and pleading, but from

[1] Not quite: the distinction between a money debt itself and damages for non-payment of the debt was significant in the old forms of action.

[2] Lush, L.J., in *Poyser* v. *Minors*, 1881, 7 Q. B. D. 333. "Practice" is usually confined to the minor details within a given form of procedure. How a jury shall be made up is matter of practice; whether there shall be a jury at all is hardly so in the common speech of lawyers.

[3] Maine, *Early Law and Custom*, p. 389.

[4] See the late Professor Thayer's *Preliminary Treatise on Evidence at the Common Law*, published in 1898.

the various branches of substantive law. What should be properly called the law of evidence, however, is the body of rules "which, with a view to ascertain individual rights and liabilities in particular cases, decides:

"1. What facts may, and what may not, be proved in such cases;

"2. What sort of evidence may be given of a fact which may be proved;

"3. By whom and in what manner the evidence must be produced by which any fact is to be proved."[1]

That is to say, the main heads are relevance of facts, proof, and burden of proof.[2] As facts which may not be proved at all, and facts not proved in the manner which the law requires, are alike non-existent for judicial purposes, it is obvious that the substantive rights of parties may be materially affected according as the rules of evidence are narrower or wider. For example, the old rule of the common law Courts,[3] that parties could not bear witness in their own causes, must have made a large number of otherwise just claims of none effect. Hence there is a considerable difficulty in drawing an exact line between rules of evidence, procedure, and law. The usual and all but inevitable solution of text-writers has been to repeat every rule that lies anywhere near the borders in every place where the mention of it might be convenient, or the want of mention misleading. Many rules of evidence, however, are of so limited an application, that they are of no use or importance apart from their special subject-matter; and when we speak of the law of evidence in general we do not consider rules of this kind.[4]

We may now contemplate in a summary way the divisions of the substantive law, bearing in mind that they are divisions of legal rules, not of the facts and affairs to which the rules apply. The same facts may call for the application of several rules belonging to distinct branches. Neither must we forget that every department has need, some more and some less, but all in a greater or less degree, of the auxiliary bodies of rules above mentioned.

An ancient and useful division neglected by Hale and Blackstone, but maintained by almost all moderns who have considered the question, is that of public and private law. While it is true that all laws exist for the sake of the common weal, and all legal duties must be duties of some person, yet some rules and heads of law seem to have regard in the first place to the safety or welfare of society as a whole, and others to be concerned with the rights of individual citizens.[5] The former are

[1] Stephen, *Digest of the Law of Evidence*, 6th ed., 1904, p. xiii.

[2] "Admissibility of evidence" is an ambiguous term covering both (1) and (2).

[3] The rules of equity pleading and evidence were different, being founded on the civilian view that the Court took an active part in ascertaining the facts.

[4] See *op. cit.*, p. xviii.

[5] "Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem," D. 1. 1, *de iust. et iure*, i. s. 2. I do not think this definition of Ulpian's has ever been improved upon. The test of the State being a party does not seem quite right, though it has respectable authority. For the State (using its own corporate name, or the name of the sovereign, or a public department, or a special body of trustees or commissioners, as the case may be) is an owner, buyer, and seller, and in many countries an undertaker, not only of postal communication and the like, but of traffic by land and water and other commercial enterprises; and these are in their nature transactions of private law, and are judged in the main by its ordinary rules, even though the State and its officers be in some respects privileged.

called public and the latter private law. Not that public law does not concern individual citizens, or that the rules of private law have no public interest; but that the public factor in the one case, and the private in the other, is more conspicuous. It will be found, moreover, that the division answers more nearly than most doctrinal classifications to the actual course of practice. Working lawyers, it is true, do not in common practice talk of either public or private law. The reason is quite simple; they are concerned with much less vast and general heads. But they do maintain, for example, a clear distinction between criminal law and the law of property, notwithstanding that, in particular criminal cases of offences against property, the Court may have to consider and decide questions of property, while, on the other hand, it may be necessary for a Court of civil jurisdiction, before it can settle a question of title to property, to decide whether a criminal offence has been committed. Again, the rules which fix the right to vote at parliamentary and municipal elections are easily seen to be in a different category from those which secure the rights of individual citizens in their daily life.

It would be a task of unprofitable conjecture to account for the perplexed and perverse arrangement adopted by Hale, and in the main followed by Blackstone, with the result of putting the legal literature of England in a distinctly inferior position to that of Scotland as regards the means of anything like a systematic and compendious view. There may have been, with Hale at any rate, some feeling of a supposed necessity to place the rights and prerogatives of the Crown as near the beginning as possible; and superficial acquaintance with the methods of Justinian's *Institutes* and the modern civilians would seem to be answerable for the "Rights of Persons" and "Rights of Things" which led both Hale and Blackstone into disastrous confusion. With Blackstone the working out of a radically bad plan was happily much ameliorated in detail by the author's admirable literary skill and practical experience of affairs.

Public Law.

Public law may be roughly distributed under the following heads:—

I. *Constitutional*, containing so much of the political constitution as is laid down in positive legal rules. This includes the formation, powers, and privileges of Parliament; the executive functions and powers of the Crown, and the legal duties and responsibility of Ministers; the existence and composition of the judicial establishment; the legal position of the clergy, the navy and army, and the various departments of the public service in relation to the Crown and Parliament; and the machinery of local government.[1]

[1] Sir William Anson's treatise on *The Law and Custom of the Constitution* is the only English book, so far as I know, that contains anything like a comprehensive and systematic account of these matters. The monographs in Macmillan & Co.'s "English Citizen" series are useful, but some of the best have unluckily been allowed to fall out of date. Students of English politics hardly need to be told that in this region it is often difficult to draw a clear line between rules of law, constitutional or parliamentary understandings, and departmental usage.

II. *Regulative*, embracing the mass of modern legislation (for there is little to be said of common law rules here, and the statutes are mostly recent), intended to safeguard the public welfare and interest partly by the direct action of the State, partly by controlling the conduct of bodies and persons in matters lawful in themselves, but having incidents and results that may lead to public inconvenience. In this kind we have Acts relating to relief of the poor, education, the government of particular professions, such as the legal and medical; also those which deal with merchant shipping, railways, factories and labour,[1] public health, building, and so forth. Many matters of this class are dealt with by Orders in Council, or local bye-laws made under authority conferred by some Act of Parliament. This is still legislation, though delegated legislation. Few indeed are the members of the commonwealth, from the great shipping and railway companies down to the smallest householder, who are not more or less affected by some of these provisions.

III. *Penal or Criminal.*—It would be idle to dwell here on the internal classification of criminal law. Certain broad divisions are so obvious that no material variation of them seems practicable. In the Criminal Code Bill of 1879 the main heads were as follows:—

TITLE I.—Introductory provisions (this included the general grounds of justification and excuse).

TITLE II.—Offences against public order, internal and external (such as treason, riot, piracy).

TITLE III.—Offences affecting the administration of justice and the maintenance of public order (corruption and neglect of officers of justice, perjury, escape of prisoners).

TITLE IV.—Offences against religion, morals, and public convenience (including nuisances).

TITLE V.—Offences against the person and reputation.

TITLE VI.—Offences against rights of property or rights arising out of contracts.

TITLE VII.—Procedure.

The order in which these topics are dealt with is not substantially different from the rather more elaborate arrangement of the Italian Code, which has been in force since 1st January 1890, and which is probably the most complete and scientific of modern penal codes. There is respectable authority, on the other hand, for placing offences against the State and public order after, and not before, offences against private persons and property. The late Mr. Justice Wright preferred that order in the draft code prepared by him for Jamaica in 1875, and recently adopted[2] in substance in St. Lucia and some other colonies. Most people, I think, would naturally turn to the beginning rather than the end of either a code or a text-book for the class of crimes which primarily affect the State. But it is really a matter of indexing one way or the other.

Besides the main body of criminal law and procedure, we have the

[1] The Workmen's Compensation Act, 1897, seems on the whole to belong to this category rather than to any branch of private law.

[2] See the *Journal of the Society of Comparative Legislation*, vol. i. pp. 177, 180.

regulation of punishment and penal discipline, which now depends, with few exceptions, if any, on modern statutes. These matters, being of an executive and not a judicial nature, stand apart from the rules in which judges and lawyers are usually versed, but without them the law would be inoperative or its operation would be capricious.

Private Law.

Many arrangements of the rules of private law have been proposed. We shall take as our guide the generality of the duties involved and the extent and permanence of the corresponding rights. By beginning at the general and constant duties of citizens to one another, and proceeding to those which are less so, and thence to those which are assumed only by voluntary acts, we shall obtain a fairly intelligible order without breaking up the familiar working titles of the law.[1]

The most general and absolute duties which we owe to one another are those which have regard to safety and freedom of the person, to security in family life, to honour and reputation, to freedom in one's livelihood and exercise of lawful business, to protection from wilful fraud, and to the enjoyment free from intrusion of whatever one is peaceably holding and using, or is entitled to use. Such duties and rights are common to all men. Moreover, they extend in many kinds of affairs much beyond the disallowance of wilful molestation or other unlawful interference. Everyone is bound to use the caution of a reasonably prudent man in the conduct of his own affairs, and to that extent to avoid putting his fellow-citizens in danger of harm to their persons or property. We are not here attempting to state the rules of law, but only the broadest principles which underlie them. The rules cannot be accurately stated in few words; there are exemptions in some directions, conferring qualified or unqualified immunities, and exceptionally strict rules in others.[2] The sum of these highly general duties, with all their developments and modifications, makes up the law of civil wrongs or torts. Most of them are pretty well understood; but the exact amount and kind of interference with another man's means of livelihood, by acts not otherwise distinctly wrongful, which will entitle him to legal redress, is extremely difficult to settle; and although there has been an important series of decisions in the House of Lords and the Court of Appeal since the first edition of this work was published, it cannot be said that we have yet arrived at a complete solution.

There is some trouble in drawing the line between the law of trespass and other wrongful interferences with rights of possession and property on the one hand, and the law of property itself on the other hand. In principle we have questions like these:—Do such and such acts amount to trespass? When may an officer of the law break open doors? Is a licence in such and such terms, or an order from one's master in such and such a course of business, a justification or excuse for

[1] For the leading ideas of this arrangement I owe much to a series of articles published many years ago by Mr. Justice O. W. Holmes in the *American Law Review*, the matter of which was only in part embodied in his work on the Common Law.

[2] We get some curious contrasts. Honest and even reasonable belief is of itself no excuse for defamation; but in matters of business there is no general duty to use any degree of prudence at all in making assertions intended for other people to act upon.

entering or remaining on land, or dealing with goods? And such questions are obviously distinct from the question to whom the land or goods belonged. They assume, not that any man is bound to know exactly what is his neighbour's, or which of his neighbours is the owner, but that he is bound to know what is not his own or subject to any right of his. But in fact the two kinds of dispute can often not be separated, and the historical and technical peculiarities of our law have likewise contributed to create a more or less debateable borderland. Text-writers on the law of property have so much else to do that they have generally confined themselves, as far as possible, to what is clearly on their own side of the border.

In the present arrangement the law of torts stands next the criminal law, and in fact they have much common ground. Many wrongful acts are both criminally punishable and the subject of civil remedies. On the other hand, the law of torts, as will shortly be seen, is rather widely separated from the law of contracts. This is contrary to the Roman and Continental usage, which groups them together under the category of Obligations; that usage is to be respected on its own ground, but I cannot see that it has any particular convenience for the purposes of the Common Law. Not much can be found, I think, that is common to our law of torts and of contracts, and not common to other branches as well. Certain rules relating to the measure of damages, and a limited part of the rules as to negligence, are the only ones of importance, excluding such as really belong to procedure, that I can think of as answering this description. The Continental method is correct from its own point of view, but it tends to obscure the practical importance of the distinction between rules of conduct imposed on parties by the law without regard to their intentions, and rules which the declared will of the parties has made the law for their case. Broadly speaking, the law of torts deals with the former class of rules, the law of contracts with the latter.

The next class of civil duties and rights, in the descending order of generality, seems to consist of those concerned with possession and property. Within this class rights are more conveniently put in the front than duties. In fact the law of property, in the special sense, is to a great extent the law of title; it is concerned mainly with the relative rights of owners, unlimited or limited, incumbrancers, and so forth, in or over a given subject-matter, and with showing how they are constituted. The duty of mere strangers to respect ownership in all its forms is taken for granted. Under this head we deal with possession and the rights arising from it; with the tenure of real estate and interest in chattels real; and with interests, absolute and qualified, in personal property. It is admitted, I think, by most recent workers in this field, that in the Common Law the idea of possession is distinctly prior to that of ownership, and even at this day is the more important of the two; but for the present purpose this matters little. Our classification of "real" and "personal" property is peculiar. As it stands, it coincides only in part with the division into "moveable" and "immoveable" which is recognised in the law of nations and by the municipal laws of all or nearly all countries, including British India, in which the Common Law does not prevail. Originally founded on the same natural difference of things, it has become, through a series of historical accidents, not merely artificial but arbitrary. A summary

view of the English law of property as a whole is therefore hardly possible.[1]

It is impossible to handle the law of property without taking account of equitable estates and interests; and so far as necessary for that purpose the law of trusts must be anticipated, or rather the historical introduction to the law of trusts must have its place here. But this does not involve considering at large the duties and liabilities of trustees and the administration of trusts. Those topics form a separate and extensive branch of English law.

The forms of dealing with property by deeds or other instruments *inter vivos* and by will, together with the rules of construction applicable to deeds and wills and other incidental matters—in short, all that we sum up in the word Conveyancing—cannot be divided in practice from the law of property itself. It is difficult to be a good real property lawyer without a conveyancer's training, and impossible to be a good conveyancer without being a good real property lawyer. Intestate succession might be placed elsewhere in a strictly scientific arrangement. But, since in our modern law it has shrunk to almost rudimentary dimensions as compared with the large place it once filled, and in many countries continues to fill, it may well enough pass, according to the common usage of lawyers and text-writers, for an appendix to the law of property and conveyancing.

Under the same great head of Property we have an important branch of the law dealing with rights over land and goods belonging to others, and this is subdivided into the law of mortgage, pledge, and lien, and the law of easements and profits. These last coincide approximately with the servitudes of Roman law; but rights of common and other similar rights, as they occur in the Common Law, have many features and incidents which, though analogies may be found to them in the customs of widely remote countries, would be difficult to parallel in any other regular system of jurisprudence. The still living recognition of local custom as a source of rights is perhaps the most interesting of these.

Then there are exclusive private rights not relating to any defined material thing, but still in the nature of property. Such are what we call franchises: the exclusive right to maintain a ferry for profit at a particular spot is the classical example. To these a number of monopolies, limited and guarded in various ways, have been added in modern times for the encouragement of literature and art, invention and industry. Such are patent rights, copyright in its various branches, and the right to trade marks.[2] All these, though they do not involve ownership of any material object, may be called statutory property.

[1] The Appendix to Part I. of Sir Kenelm Digby's *History of the Law of Real Property*, on the Place of the Law of Real Property in the English System, 5th ed., 1897, p. 29, and the tables therein given, may be usefully consulted.

[2] The right to restrain publication of unpublished matter is affirmed by the common law quite independently of copyright legislation. It is in part a right of property; in part, it would seem, a "primitive" right not yet exactly defined, but analogous to the right not to be molested in one's business. Neither property nor contract will fully account for it. Trade marks were in like manner formerly protected, to a certain extent, under the head of restraining fraud; and trade names, apart from trade mark, are so still. "Unfair competition" has become a recognised catchword in America, though not in England, for cases of this class.

We now pass from duties wholly created by the rules of law to those which depend on relations created by acts of the parties, and may be defined to a greater or less extent, according to the nature of the case, by the will of the parties themselves. In this category the most important place is taken by the law of contract with its many subdivisions, among which are the far-reaching modern developments of the law merchant. It would be out of place to enumerate them here. Common to them all is the cardinal principle of regard to the intention of the parties. That is always the first thing to ascertain. Auxiliary and restrictive rules are required, and are present in abundance, but their function is secondary. Many rules formerly supposed to be absolute have been reduced by the course of modern decisions to canons of construction, guides at need but not masters. The law of partnership and companies, it may be observed, is as much a branch of the law of contract as any part of mercantile law, though in the history of English justice it has fallen to the province of courts of equity, and company law has now, for about a generation, become for all practical purposes a matter of intricate statutory regulation, in which the principles of partnership law have sunk out of sight. We have come, indeed, to the singular result that a trading company may be formed without any substantial contract or association whatever.[1] The law of bankruptcy, though its effects are not now confined to traders, is in substance a special branch of remedial law and procedure annexed to the law merchant.

In sundry cases of "relations resembling contract" (as the Indian Contract Act calls them), obligations like those of contract are attached by law to situations where otherwise one party would make an unjust profit by another's loss, that loss having been brought about by mistake of fact, compulsion of law, or, sometimes, emergency for the protection of a common interest. The duties of compensation or restitution which arise on such occasions were recognised in our law comparatively late, and only by means of pleading a fictitious promise. Hence the recognition of "contracts implied in law," or "quasi-contracts" as we have now begun to say, as forming a distinct and substantive head of the law, has come even later. It is unfortunate that there is no authority for speaking of "constructive contracts," which would exhibit the analogy to other useful fictions in the law.

A few topics not commonly dealt with in this connection, as they belong to other special subjects and in part to special jurisdictions, appear to be of the same kind in principle. Such are the rules as to salvage, as to certain obligations of partners and tenants in common, and as to the duty towards the true owner incurred by the finder of a lost chattel who takes possession of it.

Trusts form an important head of our law which has many elements in common with the law of contract, but stands on an independent footing. The essence of trust is the acceptance of property to be held and administered for the benefit of the person from whom it is received, or of third persons, or both. A trustee's obligation is in the first instance personal, but the refinements of modern equity go far beyond the analogies of contract in the search for some one to be held liable. Moreover, rights created under trusts, though not binding against third

[1] *Salomon* v. *Salomon & Co.*, [1897] A. C. 22.

persons absolutely, are binding on third persons who have notice of the trust, and to that extent have the nature of property. Beneficial interests under the trusts of marriage settlements and wills do form, as is matter of common knowledge, a large proportion of the property and sources of income of very many persons. A peculiar feature of our law and practice under this head is the amount of administrative work undertaken by the Court, especially where the interests of infants are concerned. Much of this is quite different in kind from ordinary litigation, and cannot be judged by the same standards or reduced to the same methods.

The law of trusts, like that of contracts, has been artificially extended, for the sake of justice and convenience, to various cases where no trust has been actually created, but a legal estate or interest has been acquired in circumstances which make it inequitable for the holder to deal with the property as beneficial owner. This kind of "obligation in the nature of a trust"[1] is exactly analogous to a "quasi-contract." "Constructive contract" and "constructive trust" would be perhaps the most proper terms to mark the analogy; the latter of them is current, but the former, as above observed, has never been used at all.

There remain the domestic duties arising out of family relations, that is to say, the law of husband and wife, parent and child, and guardian and ward; this last head being no longer prominent, except sometimes in disputes between parents as to the custody or education of children, but still not obsolete. These duties depend on acts of parties, but they are strictly personal, and are not, like duties assumed by contract, variable at their will, although the right to enforce them may be lost, in certain circumstances, by misconduct or neglect. We do not count here the general disabilities or immunities of married women and infants in their dealings with the world at large, as they seem to belong in part to the preliminary notions of the law, in part to those divisions of the law of contract and property whose rules may be affected in their application by the incapacities in question.

The relation of master and servant was formerly analogous to the family relations, but in modern usage it is dealt with, both in law and in fact, as founded on contract. A few traces of the older doctrine remain in customary incidents of the contract which prevail only in the absence of any different agreement, and in rules which are now seldom used, and then not for their original purpose. The action for loss of service is perhaps the most remarkable of these survivals. A contracting party's right to bring an action against a third person for "maliciously" inducing the other party to break the contract is historically connected with the old action for enticing away a servant, but it is now maintained on other grounds, and the act of a wrong-doer in this kind must be classed among violations of the general duty not to interfere with other men's legal rights without just cause or excuse.

Common-law jurisdiction had no means of dealing with the domestic relations as between the parties themselves. The remedies now administered by our Courts, and considerably extended in the case of divorce by modern legislation, are derived partly from the earlier

[1] Indian Trusts Act, s. 80.

jurisdiction of the ecclesiastical Courts and partly from the quasi-paternal jurisdiction exercised on behalf of the King, in an executive rather than a judicial capacity, by the Chancellor.

The rules of intestate succession may be logically regarded as an auxiliary department of this branch of law, but it is in fact more convenient, and in this country it is the universal practice, to annex them to the law of property, as we have said above. As in our modern law there are no limits set, as in other systems, to a man's power to dispose of his estate and effects away from his wife, children, or kinsfolk, either in his lifetime or by will, intestate succession may be said to take place only by accident or neglect, and in England it has long been of quite subordinate importance. It now occurs, and gives trouble, mostly in the case of small estates.

We have thus taken a rough view, but still some kind of view, of the variety of topics that may engage English courts of justice. Outside all these divisions, however, but capable of becoming material within any of them, is the class of questions arising from the fact that there are many civilised jurisdictions and many legal systems in the world, and rights acquired under one jurisdiction may have to be ascertained and enforced under another. A Court often has to consider whether it should assume jurisdiction at all, and also, where its jurisdiction is confirmed or not disputed, whether it should not, in exceptional circumstances, determine the legal consequences of the facts in the case according to the rules of some other system than that which the Court habitually administers. It may be disputable both what Court is the proper one to do justice, by reason of competency or practical power of executing judgment, and what law is the proper measure of justice for the parties, by reason of their express or implied agreement to be bound by one law rather than any other, or otherwise. Questions of this kind, with all the complications incident to them, are collected under the title of "Conflict of Laws" or (inelegantly, but commonly) "Private International Law." The nature and origin of the rules applied in this region have been much discussed; but it is certain that at this day a considerable number of such rules are as much part of the law of England as those of the law merchant, which also were once of a cosmopolitan character, and were regarded as not owing their force to any municipal legislation or jurisdiction. For fuller consideration of these matters the reader must be referred to the works of specialists, such as Mr. A. V. Dicey and Mr. Westlake.

It may perhaps be useful to recapitulate in a summary form the divisions we have broadly marked out:—

A. General and Preliminary.

Persons and their capacity.
Extensions and limitations of capacity. Agency. Corporations.
Responsibility in general.
Intention and motives. Malice in law.
Liability for consequences.
Liability for acts of agents and servants.
Ignorance and mistake.
Negligence.
Acquisition and transfer of rights in general.

Rules of interpretation (so far as generally applicable).
Remedies.

B. PROCEDURE. EVIDENCE.

C. SUBSTANTIVE LAW: and herein—

I. Public Law.
Constitutional (including the judicial system).
Regulative and administrative.
Criminal.

II. Private Law.
Civil wrongs.
Property, conveyance and succession to property.
Contract. Mercantile law. Companies. Bankruptcy.
Trusts.
Family relations.

III. Conflict of Laws.

The foregoing arrangement is not put forward as representing necessarily, or in fact, the most convenient order of studying the law. Few lawyers will doubt that a student should have an elementary knowledge of the constitution of his country and the outlines of public law in general before grappling more closely with legal problems of any kind, or that the subject of "Conflict of Laws" should, so far as possible, be postponed till a fair knowledge of the ordinary application of English law to English causes of action has been acquired. But also not many will think it necessary that the details of local government or the minuter difficulties of criminal law should be studied at an early stage. It is really impossible to arrange a course of law studies in linear progression. Gradual acquaintance must be made with two or three aspects of the law simultaneously. Principles cannot be learnt to much good purpose without an eye on procedure, and the different branches of our jurisprudence so constantly illustrate one another that it is a positive advantage to the student to have more than one constantly before him.

Again, the best order for a code or consolidating statute would seem to be that which makes it most useful to the practitioners who have to deal most with it, not necessarily that which would make it easiest to follow to a person ignorant of the subject. But codes may, and in some cases have been, as in India, valuable instruments of political and even moral education to the general public, and in such cases it is proper for the legislator to consider their extrajudicial uses. It may be wise now and again to declare, with the deliberate authority of the State, things which are superfluous for the lawyer but profitable for the citizen.

F. POLLOCK.

ENCYCLOPÆDIA

OF

THE LAWS OF ENGLAND

"A" List.—See COMPANY.

Abandonment of Action.—Prior to the Judicature Acts, a plaintiff was entitled at any time to abandon his suit, in equity by applying to dismiss his bill, or at common law by claiming a non-suit. In either event he was liable to the defendant for the costs of the proceedings, and though he was not barred from bringing another suit on the same cause of action, the defendant was entitled to have such second suit stayed until the costs of the first were paid. A plaintiff could also terminate his suit by consenting to an order to dismiss; but where, after an order by consent to dismiss, the plaintiff brought a second action for the same purpose, the second action was stayed (*Parker* v. *Simpson*, 1870, 18 W. R. 204). A judgment by consent is as effective as an estoppel between the parties as if it were the judgment of the Court in a contested case (*re South American & Mexican Co.*, 1895, 1 Ch. 37).

Although the right of a plaintiff to claim a non-suit was retained by Order 41, r. 6, of the Rules of the Supreme Court, 1875, it was advisedly omitted from the existing code of rules issued in 1883 (*Fox* v. *Star Newspaper Co.*, [1898] 1 Q. B. 636, C. A.; affirmed by House of Lords, [1900] A. C. 19). In his judgment in that case the Lord Chancellor stated that such omission was the result of a determination "that the power of a plaintiff at common law to claim a non-suit, or a plaintiff in equity to dismiss his bill at his own option, should no longer be permitted." Under existing procedure, the only methods by which a plaintiff can submit to defeat is, before trial, by discontinuance under Order 26 of the Rules of the Supreme Court; or, at the trial, by allowing a verdict or judgment to be recorded against him. See DISCONTINUANCE; NON-SUIT.

Abandonment of Cargo; Claim; Ship.—See CARGO and MARINE INSURANCE.

Abandonment of Domicile.—See DOMICILE.

Abandonment of Possession.—See POSSESSION.

Abandonment of Residence.—See DOMICILE.

Abandonment of Security.—See SECURITY.

Abandonment of Trade Mark.—See TRADE MARK.

Abated.—See ABATEMENT.

Abatement.—1. *Of Civil Proceedings.*—A cause or matter formerly abated or became defective by the death of any of the parties materially interested; by the change or transfer of interest; or by operation of law. In such cases under the original practice of the Court of Chancery it was necessary to file a bill of revivor, and in some cases a supplemental bill. But by the Chancery Procedure Act, 1852, 15 & 16 Vict. c. 86, s. 52, the procedure was greatly simplified, and an order of revivor obtainable as of course was substituted for the former

cumbrous and expensive process. As regards actions in the Courts of common law, the provisions of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, dealt with cases in which writs would otherwise have abated by the death, marriage, or bankruptcy of a plaintiff or defendant, and supplied a mode of procedure enabling the plaintiff to proceed notwithstanding the happening of any such events (ss. 135-142). The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, remedied a defect in the earlier statute, by enabling the person against whom the action might be continued to compel the plaintiff or person entitled to proceed in his room to prosecute the action, or, in default, to have a judgment of *non pros.* signed against him (s. 92). Under the existing practice established by the Rules of the Supreme Court, it is provided that a cause or matter shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite;* and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment; but judgment may in such case be entered, notwithstanding the death (R. S. C., Order 17, r. 1). See ACTIO PERSONALIS.

This rule applies only to a case where the cause of action "survives or continues" in some person who is before the Court (*per* Fry, J., in *Eldridge* v. *Burgess*, 1878, 7 Ch. D. 411). In that case, after issue had been joined and notice of trial given by the sole plaintiff in an action, he filed a liquidation petition, under which a trustee of his property was appointed. When the action came on for trial, no one appeared for the plaintiff or for the trustee; and as there was no evidence that any notice of the action had been served on the trustee, the action was struck out of the list. See, too, *Jackson* v. *N.-E. Ry. Co.*, 1877, 5 Ch. D. 844; *Lloyd* v. *Dimmack*, 1878, 7 Ch. D. 398; *Warder* v. *Saunders*, 1882, 10 Q. B. D. 114; *In re Shephard; Atkins* v. *Shephard*, 1889, 43 Ch. D. 136.

The subsequent rules of Order 17 supply the necessary machinery for bringing before the Court parties who become interested by any change or transmission of interest caused by marriage, death, bankruptcy, or other event affecting the original parties to the action.

Where any cause or matter shall have been standing for one year in the cause-book marked as "abated," or standing over generally, such cause or matter, at the expiration of the year, shall be struck out of the cause-book (R. S. C., Order 17, r. 10). Where a cause has been struck out under this rule, a fresh notice of trial must be given before it can be re-entered (*Le Blond* v. *Curtis*, 1885, 33 W. R. 561).

2. *Of Criminal Proceedings*—means their termination without any decision on the merits and without the assent of the prosecutor.

(*a*) Criminal proceedings, whether summary or for indictable offences, necessarily abate by the death of the accused, but do not abate on the death of the prosecutor, being in theory instituted by the Crown (*R.* v. *Truelove*, 1880, 5 Q. B. D. 336). Nor do they now abate on the demise of the Crown (4 Will. & Mary, c. 18, s. 6; 1 Anne, c. 2, s. 8. See DEMISE OF THE CROWN). Nor is a warrant or summons avoided by the death of the judge or justice who issued it (see 42 & 43 Vict. c. 49, s. 37), or by his ceasing to hold office.

(*b*) It was at one time a common practice to put in a plea in abatement to an indictment. The plea must be pleaded before the general issue (*q.v.*), and without admitting or denying the offence charged, it set up some matter of fact which, if proved, had the legal effect of defeating the indictment as then framed. It was therefore merely dilatory, and must be pleaded with strict and precise exactness (*O'Connell* v. *R.*, 1843, 5 St. Tri. N. S. 1, 787), and must be verified by affidavit (4 & 5 Anne, c. 16, s. 11), and amendment was not allowed (*R.* v. *Cooke*, 1824, 2 Barn. & Cress. 871). Ultimately, on the abolition of appeals, it was confined to objections as to misnomer and want of addition, or improper addition, and it has fallen into disuse since the Criminal Law Act, 1826, 7 Geo. IV. c. 64, s. 19, which requires the Court to amend according to the truth, when such a plea is pleaded and proved, and the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100, s. 1, which renders description of the defendant unnecessary. [Hereon see Pollock and Maitland, ii. *Hist. Eng. Law*, 612; Hawk., P. C., bk. ii. c. 13, ss. 96-108; c. 26, s. 150; c. 31, s. 7; c. 34; Bullen and Leake, P. P., 3rd ed., 468; Arch. Cr. Pl., 23rd ed., 163; *R.* v. *Gibson*, 1806, 8 East, 107. See also AMENDMENT IN CRIMINAL PROCEEDINGS.]

In Ireland a plea in abatement is sometimes used as a mode of challenging the constitution of a grand jury (see Huband, *Grand Jury, etc., in Ireland*, p. 172).

(*c*) The Court could also abate the proceedings, either *ex officio*, or upon demurrer (*q.v.*) or motion to squash, for many formal defects (Hawk., P. C., bk. ii. c. 23, s. 96); but most of these are now made immaterial by s. 24 of the Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100; and under sec. 25 of that Act they must be challenged before the jury is sworn (see JURY), by a demurrer or motion to quash, and may be amended by the Court (Arch. Cr. Pl., 23rd ed., 51-55). See VARIANCES.

Abatement of Annuities.—See ANNUITIES.

Abatement of False Lights.—By sec. 667 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, if any owner or person is served by the general lighthouse authority with a notice (under that section) directing the extinction or screening of any light liable to be mistaken for a light proceeding from a lighthouse, and neglects to comply therewith for a period of seven days, the lighthouse authority is empowered to enter upon the place where the light may be and extinguish it, and charge the expenses of so doing to such owner or person, and such owner or person is liable to a fine not exceeding £100 for each offence. See LIGHTHOUSE.

Abatement of Freehold.—An abatement "into land" occurs where, before the entry of the heirs, a stranger wrongfully enters upon the lands. Such wrongful entry is technically called an abatement, and the stranger so entering an abator, the effect of which is to convert the heir's seisin in law into a mere right of entry. Abatement differs from intrusion, in that it is to the prejudice of the heir, while the latter is to the prejudice of the reversioner or remainder-man. Disseisin differs from both; to disseise is to put forcibly or fraudulently a person seised of the freehold out of possession. If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the

younger son entered by abatement [as distinguished from DISSEISIN (*q.v.*)] into the land, the Statute of Limitations did not operate against the elder son (Littleton, s. 396; *Sharington* v. *Shrotton*, 7 & 8 Eliz., Pl. Com. 306; *Page* v. *Selby*, Bull. N. P. 102; *Doe* v. *Long*, 1841, 9 Car. & P. 773). [This was one consequence of the doctrine of *possessio fratris* (*q.v.*). See Wms. on *Seisin*, 55.] By sec. 13 of 3 & 4 Will. IV. c. 27, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, enters into the possession or receipt thereof, such possession or receipt is not to be deemed to be the possession or receipt of or by the person entitled as heir. As to the effect of this section, see *Jones* v. *Jones*, 1847, 16 Mee. & W. 712.

[Co. Lit. 227*a*; Comyn's *Digest*, 5th ed., vol. i. p. 1; Cruise's *Digest*, i. 51.]

Abatement of Legacies.—Under certain circumstances, legatees are obliged to part with the whole or portions of their legacies, although the subjects devised to them remained, and were not adeemed (see ADEMPTION) at the testator's death. This obligation is termed "abatement" (Roper on *Legacies*, 4th ed., i. 356).

1. GENERAL LEGACIES.—In case of a deficiency of assets, all the general legacies must abate proportionately in order to pay the debts, but a specific legacy does not abate at all unless there be not sufficient without it. An executor has no power to give himself a preference in regard to his own legacy, as he has in the instance of his own debt (Toller, 347). A residuary legatee cannot claim abatement on the part of general legatees, as they are entitled to have their legacies paid in full, although it should leave no surplus for the residuary legatee (see *Baker* v. *Farmer*, 1868, L. R. 3 Ch. 537; *Breashur* v. *Dor*, 1830, 4 Sim. 21; 58 E. R. 9; *In re Tootal's Estate*, 1876, 2 Ch. D. 628).

In the case of legacies given generally and then the residue on trust to pay further legacies, these latter are in the nature of a "residuary legacy," and will not be payable until the other legacies have been paid (*In re Smith*, [1899] 1 Ch. 365; *In re Malone*, [1897] 1 Ir. R. 571).

When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, it does not abate with voluntary legacies. So, where a testator makes a general bequest to his wife in lieu of dower, such a legacy will be entitled to a preference of payment over the other general legacies, her election to accept the legacy placing her in the situation of a purchaser of what is given her by the will (*Burridge* v. *Bradyl*, 1710, 1 P. Wms. 127; 24 E. R. 323; *Davenhill* v. *Fletcher*, 1754, 1 Amb. 244; 27 E. R. 163; *Heath* v. *Dendy*, 1826, 1 Russ. 543; 38 E. R. 210; 25 R. R. 135; *Norcott* v. *Gordon*, 1844, 14 Sim. 258; 60 E. R. 357). Such a legacy has no priority, where the testator leaves no real estate out of which the widow is dowable (*Acey* v. *Simpson*, 1842, 5 Beav. 35; 49 E. R. 489; 59 R. R. 404), or where the only real estate of the testator was conveyed to him with a declaration against dower (*Roper* v. *Roper*, 1876, 3 Ch. D. 714; *In re Greenwood*, [1892] 2 Ch. 295).

Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be put "in the first place," or a direction as to the time of payment. If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be

otherwise (*Blower* v. *Morret*, 1752, 2 Ves. Sen. 420; 28 E. R. 268; *Cazenove* v. *Cazenove*, 1889, 61 L. T. 115; *In re Sweder's Estate*, [1891] 3 Ch. 44).

In cases where stock is bequeathed as a general legacy, and the legatee is called upon to abate with other general legatees, the abatement will be regulated by the value of stock at the end of one year next after the testator's death (*Blackshaw* v. *Rogers*, 1778, cited by the Master of the Rolls in *Simmons* v. *Vallance*, 1793, 4 Bro. C. C. 349; 29 E. R. 929).

In the following instances particular general legatees have, on various grounds, claimed exemption from abatement, but have been held to be liable in common with other general legatees:—

(*a*) Legacies to servants (*Attorney-General* v. *Robins*, 1722, 2 P. Wms. 25; 24 E. R. 627).

(*b*) Legacies to Charities (*Attorney-General* v. *Hudson*, 1720, 1 P. Wms. 675; 24 E. R. 564; *Bishop of Peterborough* v. *Mortlock*, 1784, 1 Bro. C. C. 566; 28 E. R. 1301).

(*c*) Legacies of sums of money to executors for their care and trouble (*Duncan* v. *Watts*, 1852, 16 Beav. 204; 51 E. R. 756).

(*d*) Legacies to creditors whose debts have been previously liquidated by composition at less than their real amounts (*Coppin* v. *Coppin*, 1725, 2 P. Wms. 292; 24 E. R. 735).

(*e*) Legacies to pay another person's debts.

(*f*) Legacies of money to be laid out in land or stock.

(*g*) Legacies for mourning rings or mourning (*Apreece* v. *Apreece*, 1813, 1 Ves. & Bea. 364; 35 E. R. 142).

(*h*) Legacy to erect a monument (probably); although in *Masters* v. *Masters*, 1718, 1 P. Wms. 423; 24 E. R. 454, Lord Parker, C., exempted such a legacy from abating with the general legacies.

(*i*) Legacies to wives and children, unless the rule of abatement is excluded by the terms of the instrument, or there is an intention to give priority apparent on the face of it (*Blower* v. *Morret*, *supra*; *Cazenove* v. *Cazenove*, *supra*; *In re Sweder's Estate*, *supra*).

2. Specific Legacies.—Specific legatees can only be called upon by the executor for abatement, upon failure of the general personal estate to discharge debts. These legacies, therefore, must be fully satisfied, to the prejudice of general legatees. But when the personal assets, not specifically bequeathed, are insufficient to pay all the debts, then the specific legatees must abate in proportion to the value of their individual legacies (*Sleech* v. *Thorington*, 1754, 2 Ves. Sen. 561, 564; 28 E. R. 357; *Clifton* v. *Burt*, 1720, 1 P. Wms. 680; 24 E. R. 566; Roper on *Legacies*, 4th ed., i. 356).

The principle of the distinction between the two classes of legatees is the presumed intention of the testator to give a preference to those to whom he has bequeathed specific parts of his personal estate, severed from the rest (Roper on *Legacies*, i. 354).

On the same principle, if the testator's freehold estate be subject to debts, a specific devisee of it will be obliged to contribute, upon a deficiency of the general personal assets, with the specific legatee of a chattel (*Long* v. *Short*, 1717, 1 P. Wms. 403; 24 E. R. 445; *In re Saunders-Davies*, 1887, 34 Ch. D. 482; *In re Bawden*, [1894] 1 Ch. 693).

Bequest of diamonds on trust for sale. Directions to pay two legacies of £600 and £700 out of the trust proceeds, not mentioning

disposition of surplus, if any. Will contained residuary bequest. The proceeds were only £900, and the £700 legacy was for other reasons declared void. The residuary legatee claimed abatement, but it was held that the £600 was a first charge on the proceeds, which must be satisfied before he could take anything (*In re Tunno, Raikes* v. *Raikes*, 1890, 45 Ch. D. 66).

3. DEMONSTRATIVE LEGACIES.—Legacies in part specific and in part general, *i.e.* bequests of money with reference to a particular fund for their payment, and not simply a gift of the specific fund itself. Such a legacy is so far general, that, if the fund be called in, or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; but it is specific, in the sense that it will not be liable to abate with general legacies upon a deficiency of assets (*Mann* v. *Copland*, 1817, 2 Madd. 223; 56 E. R. 317; *Creed* v. *Creed*, 1844, 11 Cl. & Fin. 491; 8 E. R. 1187; 65 R. R. 252; *Livesay* v. *Redfern*, 1836, 2 Y. & C. 90; *Tempest* v. *Tempest*, 1857, 7 De G., M. & G. 473; 44 E. R. 185; *Roberts* v. *Pocock*, 1798, 4 Ves. 150; 31 E. R. 77).

A satisfied legatee can be called upon by the other legatees to refund if it be afterwards found that the fund from which he has been satisfied has wasted (*In re Lepine, Dowsett* v. *Culver*, [1892] 1 Ch. 210). See ANNUITIES (8), *Abatement;* ASSETS; LEGACIES.

Abatement of Nuisance.—See NUISANCE.

Abatement of Purchase-Money.—This arises in cases of specific performance of contracts. The vendor is *primâ facie* responsible for the description by which a thing is contracted to be sold. At law, advantage might be taken of a misdescription which rendered strict performance of the contract impossible and the purchaser's remedy was for damages, but the Courts of equity obliged the purchaser to accept the property, with an abatement of the purchase-money by way of compensation, in cases where he would then obtain the reasonable and substantial benefit of the contract (*Halsey* v. *Grant*, 1806, 13 Ves. 73; 33 E. R. 222; 9 R. R. 143). See SPECIFIC PERFORMANCE:—*Compensation.*

Abatement or Rebate (in Commerce).—An allowance of discount made for prompt payment.—The term is also sometimes used to express the deduction that is occasionally made at the custom-house from the duties chargeable upon damaged goods, and for a loss in warehouses.

Abatement, Pleas in.—Under the old system of pleadings, pleas which, without either admitting or denying the existence of the cause of action, alleged some matter of fact which would in law preclude the plaintiff from recovering upon the writ and declaration as then framed, were called pleas in abatement. They belonged to the class of dilatory pleas (*q.v.*), as distinct from pleas in bar (see BAR, PLEA IN), because they raised a formal defence not affecting the merits. Such pleas would assert the non-joinder of some necessary party, or that either party was under some personal disability, or that another action was already pending for the same cause. But now, by Order 21, r. 20, all pleas in abatement are abolished. The proper procedure now

in such cases is explained in *Kendall* v. *Hamilton*, 1879, 4 App. Cas. 504; *Pilley* v. *Robinson*, 1887, 20 Q. B. D. 155; and *Wilson* v. *Balcarres Brook Steamship Co.*, [1893] 1 Q. B. 422.

Abbey, Abbot.—An abbey denoted the place of habitation of a society of persons, male or female, leading a religious life, of which the head was known as an Abbot or Abbess. At common law these bodies were recognised as corporations, and the individual members of such corporations, other than lay members, are regarded in the eyes of the law as *civiliter mortui*. There were also other religious foundations of different kinds similarly recognised, but all abbeys, priories and other religious foundations of a like kind were dissolved chiefly by legislative action either before, or for the most part during, the Reformation (see 27 Hen. VIII. c. 28; 31 Hen. VIII. c. 13; 37 Hen. VIII. c. 4; Edw. VI. c. 14). Since the date of the Reformation, no body of any kind professing to be a religious community has been recognised as such by the law. See also PRIORY; PRIOR. See also ROMAN CATHOLIC; CHARITIES; and as to abduction of nuns, ABDUCTION. For abbey lands, see TITHES. As to the legal position of present religious orders and the restrictions to which they are subject under statute or otherwise, see RELIGIOUS ORDER; JESUIT.

Abbuttals or Abuttals.—"Abbuttals seem to come from the French *abutter*, *i.e.* the Buttings or Boundings of Lands, showing to what other Lands, highways or places they belong or are abutting" (*Termes de la Ley*). "The extremities or bounds of land; the parts in which it abuts upon neighbouring lands"—*New English Dictionary*, (Murray).

Abdication.—English constitutional history supplies no precedent of a voluntary abdication of the crown. Edward II. was deposed; a Parliament having been irregularly summoned, articles were drawn up by declaring him unfit to reign, and commissioners were sent to request his assent to his son's succession. This he gave, and Sir William Trussell, as proctor for the whole Parliament, renounced their allegiance (Stubbs, c. XVI. 255). Richard II. was induced to execute a deed of resignation in which he absolved all his people from the oaths of fealty and homage and all other bonds of allegiance, royalty and lordship by which they were bound to him; but this was not thought enough, and Parliament proceeded to draw up articles against him, which the Estates voted were sufficient ground for deposing him. Then Henry of Lancaster claimed the crown, and was accepted by Parliament, and commissioners were sent to signify to Richard his deposition, and renounce their allegiance (Stubbs, c. XVI. 269; c. XVIII. 302). It was debated in the Convention Parliament at the Revolution whether the throne was vacant between Richard's resignation and the enthroning of Henry IV. In the case of James II., the Convention resolved that, "King James II. having endeavoured to subvert the constitution of the kingdom by breaking the original contract between king and people, and having, by the advice of Jesuits and other wicked persons, violated the fundamental laws and withdrawn himself out of the kingdom, has *abdicated* the government, and that the throne is thereby vacant." The Lords wished to substitute "deserted" for "abdicated," which, it was

contended, was a word not known to English law, but the amendment was rejected, as leaving it open to James to return (see debate on the word "abdicated" in 5 Parl. Hist. 61, especially the future Lord Somers, p. 69). The Declaration of Rights simply recites that James had abdicated the government, and that the throne was thereby vacant. It seems to have been the general opinion in the debate above mentioned that a sovereign could lawfully abdicate; but it would not appear that an abdication could be fully carried out at the present day without an Act of Parliament.

Abduction.—1. A term originally used with reference to the taking of a person, not *sui juris*, out of the possession or custody of husband, parent or legal guardian. Abduction of women was common during the Middle Ages, being regarded as gallantry rather than crime, and probably a survival of marriage by capture (Pollock and Maitland, *Hist. Eng. Law*, ii. 363; Pike, *History of Crime*, i. 266, 477). At common law the remedies were by indictment or action for false imprisonment, if the person abducted was unwilling (3 Co. Inst. 55), or by action on the case (*q.v.*) by husband, parent or guardian, for the pecuniary loss sustained by him, or by writ *de homine replegiando* (*Lord Grey's Case*, 1682, 9 St. Tri. 127; Show. 61, 76; *Calthrop* v. *Axtel*, 1687, 3 Mod. 169; and see F. N. B. 66; 2 Co. Inst. 55). This writ is now disused and the writ of *habeas corpus* is employed instead (2 Co. Inst. 55; and see ADULTERY; HABEAS CORPUS; SEDUCTION).

Abduction has been the subject of much legislation since the Statute of Merton (20 Hen. III. c. 6), all repealed and superseded by statutes of this reign, with the following exceptions:—

No larceny could be committed by taking or carrying away a ward or villein, "because they are in the realty" (3 Co. Inst. 109). But by Stat. Westm., 13 Edw. I. c. 35, it is a misdemeanor punishable by two years' imprisonment to take or carry away (*rapere vel abducere*), any infant, male or female, whose marriage belongeth to another (see 2 Co. Inst. 437). Where the child is a ward of the High Court, abduction is also punishable as contempt of Court (*Herbert's Case*, 1731, 3 P. Wms. 116; 24 E. R. 992).

By c. 34 of the same statute (also unrepealed), if a wife is carried away (*abducta*) with the goods of her husband, the "king shall have the suit for the goods so carried away." If a wife elopes, she forfeits her dower, unless her husband takes her back and is reconciled to her without coercion of the Church (2 Co. Inst. 435); and she can now also be indicted jointly with the adulterer for larceny (45 & 46 Vict. c. 75, ss. 12, 16; *R.* v. *Streeter*, [1900] 2 Q. B. 601; *R.* v. *James*, [1902] 1 K. B. 540). The same chapter makes it a misdemeanor, punishable with imprisonment for three years and fine "at the king's will," to abduct a nun from the nunnery (*domus*), "even though she consent." Her church lord, the abbess or prioress, had also an action of trespass on the case against the offender (see 2 Co. Inst. 433-436, Reg. Jud. 269). Though nunneries are not now illegal (10 Geo. IV. c. 7, s. 37), the change, since the Reformation, in the policy of the law as to monastic vows and institutions, makes it strange that the enactment has not been expressly repealed. The subsequent Acts from 3 Hen. VII. c. 2, except the Habeas Corpus Act, being now repealed, it is enough to refer to Hawk., P. C., bk. i. c. 42; 1 East, P. C., 452, 457; 4 Black. *Com.*, 288; 3

Russ. on *Crimes*, 6th ed., 260-266; and the *Wakefield Case*, 1827, 2 Lew. C. C. 1, and special report published by Murray in 1827.

Abduction of females is now *felony* in three cases—(*a*) Where any person from motives of lucre takes away or detains, *against her will*, any woman of any age who has any interest in any property, or any even presumptive expectation of property as heiress or next-of-kin, with intent to marry or defile her, or to cause her to be married or defiled (24 & 25 Vict. c. 100, s. 53). (*b*) Where any person with such intent fraudulently allures, takes away, or detains *out of the possession and against the will of* parent or lawful custodian any woman *under* twenty-one, entitled to property as above described (24 & 25 Vict. c. 100, s. 53). (*c*) Where any person with such intent, by force, takes away or detains *against her will* any woman of any age (24 & 25 Vict. c. 100, s. 54).

All these felonies are punishable by penal servitude from three to fourteen years, or imprisonment for not more than two years (24 & 25 Vict. c. 100, ss. 53, 54; 54 & 55 Vict. c. 69, s. 1), and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1 (11)). A person convicted of offences (*a*) or (*b*) becomes incapable of taking any estate or interest whatever in the property of the abducted woman; and if the abduction has resulted in marriage, the High Court, on the application of the Attorney-General, must settle her property (24 & 25 Vict. c. 100, s. 53). This provision is similar to that of the Marriage Act, 1823, 4 Geo. IV. c. 76, s. 37, as to marriages solemnised between parties under age by means of false oath or fraud. See MARRIAGE.

There is no decision on these sections, except *R.* v. *Burrell*, 1864, 33 L. J. M. C. 54, a charge of fraudulent allurement under sec. 53, which failed on the facts. For cases on the superseded Acts, see 3 Russ. on *Crimes*, 6th ed., 251-7; Arch. Cr. Pl., 23rd ed., 898-901. As to the old law, see 3 Russ. on *Crimes*, 6th ed., 666. Under Lord Hardwicke's Act, 26 Geo. II. c. 33, marriage after abduction was void, but now it is at most voidable, if the consent of the woman was obtained by fraud or duress (*Scott* v. *Sebright*, 1886, 12 P. D. 21; *Ford* v. *Stier*, 1896, Prob. 1; *Moss* v. *Moss*, [1897] Prob. 263, 271).

Abduction of females is a *misdemeanor* in two cases—(1) Where an unmarried girl under sixteen is unlawfully taken out of the possession and against the will of her parent or proper custodian (24 & 25 Vict. c. 100, s. 54). (2) Where an unmarried girl under eighteen is taken out of the possession and against the will of her parent or proper custodian, with intent that the girl should be unlawfully and carnally known by any man (48 & 49 Vict. c. 69, s. 7).

These misdemeanors are punishable by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 100, s. 55; 48 & 49 Vict. c. 69, s. 7), and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1; 48 & 49 Vict. c. 69, s. 17). Reasonable belief that the girl was sixteen, or over, is no defence to the former offence (*R.* v. *Prince*, 1875, L. R. 2 C. C. R. 122); but reasonable grounds for belief that the girl was sixteen, or over, are an answer to a charge for the second offence (48 & 49 Vict. c. 69, s. 7; *R.* v. *Packer*, 1886, 16 Cox C. C. 57).

The consent of the girl is no defence in either case (*R.* v. *Mankletow*, 1853, 22 L. J. M. C. 115), nor can she, it would seem, be charged for taking part in the offence (see *R.* v. *Tyrrell*, [1894] 1 Q. B. 710). It

must be proved that she was in possession or custody of parent, guardian or employer, to the knowledge of the accused (*R.* v. *Olifier*, 1866, 10 Cox C. C. 402; *R.* v. *Miller*, 1876, 13 Cox C. C. 179; *R.* v. *Henkers*, 1887, 16 Cox C. C. 257; *R.* v. *Hibbert*, 1869, L. R. 1 C. C. R. 184), and was actually taken away therefrom against the will of the custodian, by fraud on him, and by persuasion, allurement or inducement held out by the accused. See *R.* v. *Jarvis*, 1902, 20 Cox, 249, and for other decisions, Arch. Cr. Pl., 23rd ed., 900; 3 Russ. on *Crimes*, 6th ed., 253, 258.

The procedure of the Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15, ss. 12-18 and sched. 1, is applicable in the case of abduction of a girl under sixteen, and sec. 17 throws on the defendant, in certain events, the proof that the girl is sixteen, or over. See CRUELTY TO CHILDREN.

The accused person is a competent but not a compellable witness for the defence (61 & 62 Vict. c. 36, s. 1), and in all cases of abduction within the Acts of 1861 and 1885, the husband or wife of the accused may be called for the prosecution or defence without the consent of the accused (61 & 62 Vict. c. 36, s. 4, sched.).

As to detention of women in brothels, see BROTHEL.

2. The term abduction is sometimes applied to "kidnapping" or "trepanning," or the forcible stealing and carrying away any person of either sex, or any age—which constitutes the common law misdemeanor of assault and false imprisonment, and, when the victim is taken abroad, falls within the Habeas Corpus Act, 1679 (see *Designy's Case*, 1682, Sir T. Ray. 474)—and to the statutory felony of child-stealing (24 & 25 Vict. c. 100, s. 56). See KIDNAPPING.

3. Any person who, by abduction or duress, interferes with the free exercise by a voter of his franchise, at any parliamentary or municipal or local government election, is guilty of "undue influence," which is a misdemeanor, punishable on indictment by imprisonment for not more than one year, or a fine not exceeding £200, and a "corrupt practice," entailing disqualification to vote, sit in Parliament, or hold municipal office for seven years (45 & 46 Vict. c. 50, s. 77; 45 & 46 Vict. c. 51, ss. 2, 3, 6; 47 & 48 Vict. c. 70, s. 2; 51 & 52 Vict. c. 41, s. 75; 56 & 57 Vict. c. 73, s. 48; 62 & 63 Vict. c. 14, s. 2 (5)). The offence is now rarely committed. The only reported case is *H.M. Advocate* v. *Douglas*, 1866, 5 Irvine, 265, decided under 17 & 18 Vict. c. 102, s. 5, of which 46 & 47 Vict. c. 51, s. 2, is a re-enactment; but a prosecution was directed also in the *Borough of Lisburn Case*, 1868, Wolf & B. 227. And see CORRUPT PRACTICES.

Abettor.—A person is said to aid or abet the commission of an offence when, though he does not himself do the act which constitutes it, or is not the principal offender or *actor*, he is present when it is committed, with the object of facilitating its commission (*præsens est abettans aut auxilians actorem ad feloniam faciendam*), or, if absent, intends to facilitate its commission, and is near enough to do so, should occasion arise. The element of common criminal purpose must link the *actor* (*auteur*) with the persons who are charged with aiding and abetting him; and the charge preferred must be one of a crime committed in the execution of the common purpose, and not foreign to it (see Stephen, *Dig. Crim. Law*, 6th ed., arts. 38, 39, and for case law, 1 Russ. on *Crimes*, 6th ed., 162-170; Arch. Cr. Pl., 23rd ed., 12-16). The abettor must

take part not only in the formation but in the execution of the criminal purpose. If he does not, he is a co-conspirator only, or an accessory before the fact, and not an accessory at the fact, to use the old phrase by which abettors were described. He must be present when the crime is committed. Constructive presence is said to be sufficient; but this means that he must be within reach, *e.g.* where a confederate is watching for the police, while a burglary is being executed (1 Russ. on *Crimes*, 6th ed., 162); and where the *modus operandi* involves transmission through an innocent agent, *e.g.* of poison by a messenger, or a libel by the post, presence at the *locus a quo* is sufficient (3 Co. Inst. 138, Fost., 2nd ed., 349; 1 Russ. on *Crimes*, 6th ed., 167). Since the sixteenth century, it has been well settled that all persons present, aiding or abetting, are principals, and that their trial is not subject to the same incidents as that of an accessory before or after the fact (see ACCESSORY). But so long as any felony was punishable by statute by death without benefit of clergy (*q.v.*), the judges were astute to distinguish between principals in the first degree and principals in the second degree, *i.e.* aiders and abettors. [See Fost., 2nd ed., 348, 355-359; 2 Stephen, *Hist. Crim. Law*, 230; Arch. Cr. Pl., 23rd ed., 1298, 1309; 3 Russ. on *Crimes*, 6th ed., 161.]

The legal reason for the distinction has vanished with the alteration of the scale of punishments for crime, and now aiders and abettors, either in treason, felony, or misdemeanor, in the absence of specific statutory provision to the contrary, are punishable to the same extent as the actual perpetrator of the offence. This had always been the common law rule as to treason and misdemeanor (Fost., 2nd ed., 341), and apparently as to felonies whose punishment was not regulated by statutes ousting benefit of clergy (Fost., 335; 2 Stephen, *Hist. Crim. Law*, 230). It is now the statutory rule as to all misdemeanors, whether at common law or under Acts passed before or since 1861 (24 & 25 Vict. c. 95, s. 8), and as to felonies under the other Criminal Law Consolidation Acts of that year (24 & 25 Vict. c. 96, s. 98 (*larceny*); c. 97, s. 56 (*malicious damage*); c. 98, s. 49 (*forgery*); c. 99, s. 35 (*coinage offences*); and c. 100, s. 67 (*offences against the person*); and as to *piracy*, by 7 Will. IV. & 1 Vict. c. 88, s. 4). Aiders and abettors of offences punishable on summary conviction are also tried and punished as principals (Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43, s. 5; 24 & 25 Vict. c. 69, s. 99; c. 97, s. 63; *Benfield* v. *Simms*, [1898] 2 Q. B. 641).

An abettor can be tried either with, before, or after the principal offender. As to forms of indictment, see Arch. Cr. Pl., 23rd ed., 1298, 1309; 1 Russ. on *Crimes*, 6th ed., 169. Except where there is a difference in punishment between principals in the first degree, and those in the second degree, both can be charged jointly with commission of the offence, without the addition of any special averment that the principals in the second degree were present aiding and abetting (see 3 Russ. on *Crimes*, 6th ed., 169).

A person may be convicted of aiding and abetting the commission of an offence in which he or she could not be principal, *e.g.* a woman or boy under fourteen of aiding rape (*R.* v. *Ram*, 1893, 17 Cox C. C. 609; *R.* v. *Waite*, [1892] 2 Q. B. 600; and see Arch. Cr. Pl., 23rd ed., 23), or a solvent person of aiding a bankrupt to commit offences against the bankruptcy laws.

Abeyance.—This term, derived from the old French word

bazer, to expect, denotes the condition of an inheritance without a present owner. Thus, on the death of an incumbent, the freehold of the benefice is said to be in abeyance until the next incumbent takes possession; and if a man makes a lease of lands to A. for life, with remainder to the heir of B., the fee-simple is in abeyance till B.'s death. An estate tail also might fall into abeyance by the attainder of the tenant in tail. The term is perhaps most commonly used at the present day in the case of a peerage inheritable through heirs general, which, if there be two or more co-heiresses, is said to be in abeyance between them. See CONTINGENT REMAINDERS; PEERAGE.

Abigeat.—1. Said to be occasionally used by medical writers as an equivalent for abortion, artificially caused. See Ash. *Dict.*; Forcell. *Lex. Tot. Lat.*, *s.v.* "Abiga."

2. Cattle-lifting. See ABIGEUS.

Abigeus or Abigevus (late Latin for *abactor*).—A term of Roman law applied to cattle-lifters, *i.e.* persons who make a business of driving off (*abigunt*) cattle from their pastures or herds, as distinguished from thieves (*fures*) (*Dig.* lib. xlvii. tit. 14; Forcell. *Lex. Tot. Lat.*, *s.v.* "Abactor," "Abigeus," "Abigeatus"). It did not apply to taking single stray beasts (Du Cange, *Gloss.*, *s.v.*). "*Abactores sunt qui unum equum, duas equas, totidemque boves, vel capras decem aut porcas quinque abegerint*" (Paul. Sent. 518, s. 1). Its punishment as a crime in Roman law depended on a rescript of Hadrian, and there is no warrant for treating cattle-lifting as an offence in any way distinct from larceny or robbery in English common law, except a single passage in Bracton, probably lifted by him from Azo, or some other early civilian. See *De Legg. Ang.* lib. iii. "De actionibus," c. viii. f. 105.

Ability.—The meaning of this term, as it occurs in 9 Geo. IV. c. 14 (Lord Tenterden's Act), s. 6, was elaborately discussed in *Lyde* v. *Barnard*, 1836, 1 Mee. & W. 101; 46 R. R. 269, which was an action on the case for falsely representing, in answer to inquiries on that subject, that a life interest in certain trust funds was charged only with three annuities, there being in fact a mortgage for £20,000 in addition, whereby the plaintiff was induced to advance money secured by covenant, bond, warrant of attorney, and an assignment of the life interest in the said trust funds. The representation was made by parol. At the trial the plaintiff was non-suited on the ground that the case fell within the above-mentioned section, which provides that "no action should be maintained whereby to charge any person upon, or by reason of, any representation or assurance made or given, concerning or relating to the character, conduct, credit, *ability*, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith." On the motion for a new trial, the Court was equally divided, Lord Abinger and Gurney, B., holding that the case fell within the section, as being a representation concerning the borrower's *ability* to perform an engagement of a pecuniary nature; Barons Parke and Alderson holding that it did not, on the ground that the representation related to the trust fund only, and in no way to the personal credit of the borrowers; that

the word ability, looked at in its ordinary sense, meant some quality belonging to the third party, and not to the thing to be transferred. See *Swann* v. *Phillips*, 1838, 8 Ad. & E. 457; 47 R. R. 626; *Bishop* v. *Balkis Consolidated Co.*, 1890, 25 Q. B. D. 512.

Ab initio.—When authority or licence is given to anyone by the law, and he abuses it, he becomes a trespasser *ab initio;* but where an authority or licence is given by the party, and he abuses it, he must be punished for the abuse, but is not a trespasser *ab initio.* The reason of the difference being that, in the case of a general authority, or licence of law, the law adjudges by the subsequent act with what intention the trespasser entered; but when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence. The law gives authority to enter into a common inn or tavern; to the lord to distrain; to the owner of the ground to distrain damage-feasant; to the owner in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle. But if he who enters into the inn or tavern doth a trespass—as, if he carries away anything, or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he, who enters to see, waste, break the house, or stays there all night; or if the commoner cuts down a tree;—in these and the like cases the law adjudges that he entered for that purpose, and because the act which demonstrates it is a trespass he shall be trespasser *ab initio* (*The Six Carpenters Case*, 8 Jac. i.; 8 Co. Inst. 146 (*a*)).

A mere nonfeasance does not amount to such an abuse as renders a man a trespasser *ab initio—s.c.*, as a refusal to do something one ought to do (*Jacobson* v. *Blake*, 1844, 6 Man. & G. 925; *West* v. *Nibbs*, 1847, 4 C. B. 172; 72 R. R. 575), where it was held that a landlord who accepted the rent in arrear, and expenses, after impounding a distress, and then retained possession of the goods distrained, was only guilty of a nonfeasance, and therefore not a trespasser *ab initio*, though he might be liable for a conversion of the goods to his own use. The abuse of a distress makes a trespass *ab initio* at common law, but the statute 11 Geo. II. c. 19, s. 19, provides that no "unlawful act" afterwards done by the distrainers shall make the distress for rent actually due unlawful, or the distrainer a trespasser *ab initio*, but that the party aggrieved by such unlawful act shall recover full satisfaction for the special damage sustained thereby, and no more. See also DISTRESS.

Abjuration.—A renunciation by oath.—At common law, it signified the oath of a person who had taken sanctuary, to leave the realm. This was abolished by 12 Jac. I. c. 28. In the reign of William III., an oath of abjuration was, by 13 Will. III. c. 16, to be "tendered to every person entering any public office, to the effect that they renounced the title of the pretended Prince of Wales," *i.e.* the son of King James II., to the English throne and the rights of the present dynasty under the Act of Settlement (*q.v.*). (See also 1 Geo. I. c. 2, s. 13.) This Act was altered and continued by 6 Geo. III. c. 53. A different form of oath for the oath of supremacy, allegiance, and abjuration, was substituted for the old oaths by 30 & 31 Vict. c. 75, s. 5, and 31 & 32 Vict. c. 72 (see OATH; OATH OF ALLEGIANCE). Divers enactments

and oaths relating to the subject of abjuration are repealed by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48).

The word is also used to signify a formal retraction of religious error. A form of abjuration for admitting converts from the Church of Rome was drawn up by one of the Houses of Convocation in 1714, but did not receive royal sanction (see Cordwell's *Synodaliæ*).

Able-bodied Seamen.—See SEAMAN.

Ablutions.—See RITUAL.

Abode (Habitation, Place of Residence).—"A man's residence, where he lives with his family and sleeps at night, is always his place of abode, in the full sense of that expression" (*per* Lord Campbell, C.J., *R.* v. *Hammond*, 1852, 17 Q. B. 772; 21 L. J. Q. B. 153). "There is no strict or definite rule for ascertaining what is inhabitance or residence. The words have nearly the same meaning. Sleeping once or twice in a place would not constitute inhabitance. There is no precise line to be drawn. It is always, if the inhabiting is *bonâ fide*, a question of more or less. The question is whether there has been such a degree of inhabitance as to be in substance and in common sense a residence. When a person has a country and a town house, it is a mere question of fact whether he has two or only one residence" (*per* Blackburn, J., *R.* v. *Mayor of Exeter; Wescomb's Case*, 1868, L. R. 4 Q. B. 110). "A person may inhabit a place without sleeping there, or he may sleep there without inhabiting it. The fact that a person sleeps in a place is generally a very important ingredient in deciding whether he inhabits it, but it is not conclusive" (*per* Blackburn, J., *R.* v. *Mayor of Exeter; Dipstale's Case*, 1868, L. R. 4 Q. B. 114). See the view taken in a registration case where a person "lived" in two sets of lodgings (*Miller* v. *Bruce*, 2 F. 265, Ct. of Sess.).

The term, however, does not invariably bear the same meaning; for some purposes a place of business may be regarded as equivalent to abode. Thus, in a notice of action, a solicitor may give his place of business as his "place of abode," though he resides at another place (*Roberts* v. *Williams*, 1835, 4 Dowl. 486; 5 L. J. M. C. 23).

In *Courtis* v. *Blight*, 1861, 31 L. J. C. P. 48; 5 L. T. 450, decided under the Registration Act, 6 Vict. c. 18, s. 7, it was said by Erle, J., that what is a person's abode is rather a question of fact than law.

In *Mason* v. *Bibby*, 1864, 2 H. & C. 881; 33 L. J. M. C. 105, it was decided that where under s. 150 of the Public Health Act, 1848, a notice was required to be served, either personally or by delivering it to some inmate of the owner's or occupier's place of abode, a place of business was a "place of abode." A place of abode is of course not equivalent to domicile. See DOMICILE; LAST PLACE OF ABODE; REGISTRATION OF VOTERS; USUAL PLACE OF ABODE.

Abominable Crime is a statutory description of "buggery," which comprises (1) sodomy, or carnal knowledge *per anum* of a human being by a male person (*R.* v. *Jacobs*, 1817, Russ. & R. 331), and (2) bestiality, or carnal intercourse in any manner between a human being and *any* animal (*R.* v. *Brown*, 1890, 24 Q. B. D. 357). Prior to 1533, these acts, though regarded by law writers as crimes, were usually

treated as vice or sin punishable by ecclesiastical sanctions (1 East, P. C., ch. xiv. p. 480; 3 Co. Inst. 58; 1 Hawk., P. C., bk. i. ch. 4; 3 Russ. on *Crimes*, 6th ed., 249; 2 Stephen, *Hist. of Crim. Law*, 429; Pollock and Maitland, *Hist. Eng. Law*, ii. p. 554). Their commission was made felony punishable by death, without benefit of clergy (*q.v.*), by 25 Hen. VIII. c. 6 (made perpetual by 32 Hen. VIII. c. 3, modified by 2 & 3 Edw. VI. c. 29, repealed by 1 Mar. St. 1, c. 1, s. 3, revived, confirmed, and made perpetual by 5 Eliz. c. 17, and ultimately superseded by 9 Geo. IV. c. 31, ss. 1, 15, 17).

1. These offences are now felony, punishable by penal servitude for life, or not less than three years, or by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 100, s. 61; 54 & 55 Vict. c. 69, s. 1); and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). See QUARTER SESSIONS. Proof of penetration, but not of emission, is necessary to constitute the offence (24 & 25 Vict. c. 100, s. 63). [See Arch. Cr. Pl., 23rd ed., 924, and as to medical evidence of the commission of the offence, see Luff, *Forensic Medicine*, ii. 273.]

2. An attempt, or assault with intent, to commit this felony, and an indecent assault on a male person, are misdemeanors punishable by penal servitude for from three to ten years, or imprisonment for not more than two years (24 & 25 Vict. c. 100, s. 62; 54 & 55 Vict. c. 69, s. 1), and are triable at Quarter Sessions. On an indictment for the felony, the jury may convict of the attempt (14 & 15 Vict. c. 100, s. 9). Consent is no answer to an indictment for the felony, but is so on a charge of assault with intent or of indecent assault (*R.* v. *Wollaston*, 1872, 12 Cox C. C. 180), except where the person assaulted is under thirteen (43 & 44 Vict. c. 45, s. 2). As to the liability of females for participation in these offences, see 3 Co. Inst. 59; 3 Russ. on *Crimes*, 6th ed., 249. Males under fourteen cannot be convicted of the felony (3 Co. Inst. 59); but may, it would seem, be convicted of the misdemeanor (*R.* v. *Waite*, [1892] 2 Q. B. 600; *R.* v. *Williams*, [1893] 1 Q. B. 320). [For the forms of indictment, see 3 Russ. on *Crimes*, 6th ed., 250, 251; Arch. Cr. Pl., 23rd ed., 926.]

3. Committing or procuring the commission of acts of gross indecency (even not amounting to sodomy, and even if assented to) in public or in private with a male person is a statutory misdemeanor, punishable by imprisonment for not more than two years (48 & 49 Vict. c. 69, s. 11). It is not triable at Quarter Sessions (same Act, s. 17). [As to this offence, see *R.* v. *Rowed*, 1842, 11 L. J. M. C. 74; *R.* v. *Jones*, [1896] 1 Q. B. 4.] Where the offences numbered 2 and 3 are committed against or with a male person under sixteen years of age, the procedure sections of the Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15, ss. 12-18, and sched. 1, apply. See CRUELTY TO CHILDREN.

4. Solicitation or incitement to commit, or to attempt to commit, any of the above offences is an indictable misdemeanor (*R.* v. *Ransford*, 1874, 13 Cox C. C. 9; 2 Russ. on *Crimes*, 6th ed., 251, note (*w*); Arch. Cr. Pl., 23rd ed., 1293).

The above offences (1, 2, 4), are "infamous crimes," within 24 & 25 Vict. c. 100, ss. 46, 47, 48, which make it felony for any person to accuse, or threaten to accuse, of such offence, with intent to extort, or to induce any person to execute a valuable security by such threat or accusation. See INFAMOUS CRIMES; MENACES.

5. A wife may divorce her husband if he is guilty of sodomy or bestiality (20 & 21 Vict. c. 85, s. 27). See DIVORCE.

Aborigines, Protection of.—After 1833, when the Emancipation Act put an end to slavery throughout the British colonies, a movement connected with the same humanitarian object was set on foot, to protect the aborigines also from the cruelty of colonists.

This movement led to the formation of a Select Committee of the House of Commons, "to consider what measures ought to be adopted with regard to the native inhabitants of countries where British settlements are made, and to the neighbouring tribes, in order to secure to them the due observance of justice and the protection of their rights, to promote the spread of civilisation among them, and to lead them to the peaceful and voluntary reception of the Christian religion" (see Report of this Committee, 1837).

Along with this Committee came into existence the well-known Aborigines Protection Society, an institution which has done much for the realisation of its purposes and still finds no lack of work to do.

The British Legislature has dealt with the aborigines question in two Acts—The Kidnapping Act, 1872, for the Prevention and Punishment of Criminal Outrages upon Natives of the Islands of the Pacific Ocean, 35 & 36 Vict. c. 19; and the Pacific Islanders Protection Act, 1875, 38 & 39 Vict. c. 51, extending the provisions of the Kidnapping Act.

Besides these special Acts, there are clauses in some of the Colonial Constitutions specially protecting the aborigines from violence or injustice by colonists. The British North America Act, 1867, 30 & 31 Vict. c. 3, contains a clause (s. 6, subs. 24) framed with this object, and the Canadian Parliament has passed at least two laws in favour of the aborigines.

In the New Zealand Constitution Act, 9 & 10 Vict. c. 103, it is enacted (s. 10) that it shall be lawful for Her Majesty to make provision for the maintenance of native laws in all cases where the English law is repugnant to the natives, and to set apart particular districts where native laws should be observed. This provision is repeated in the Act to grant a Representative Constitution to New Zealand, 15 & 16 Vict. c. 72, which also contains a clause (s. 73) forbidding colonists from trafficking in land with the aboriginal natives, and declaring that the aborigines shall have no power to make over any land belonging to them, to colonists or persons other than aborigines.

Under Article 9 of the General Act of the African Conference, 1885, the signatory States agreed to do everything in their power to put an end to the slave trade within their spheres of influence; and the preamble of the General Act of the Brussels Conference, 1889-90, further states that "the signatory States are equally animated by the firm intention of protecting effectively the aboriginal populations of Africa." The latter general Act, which is the charter of native rights in Africa, deals not only with the slave trade carried on by the Arabs in Africa, but with the various methods employed by European "civilisation" for the extermination and degradation of aborigines (see *Blue Book*, "Africa," No. 8A, 1889).

[In the Transvaal, the Colonial Government has taken action for the protection of natives employed there (*Parl. Papers*, 1902, Cd. 904). In Australia questions affecting the aboriginal populations of the States are left to their legislatures to deal with; but the Federal Parliament has passed a statute (No. 16 of 1901) forbidding the further importation of Pacific Island labourers, and providing for the return of those already

employed in Australia by the end of 1906, in spite of the protest of Queensland, which has provided for the protection of the aboriginals by a statute of 1897.]

Abortion, or miscarriage, as a legal term, means expulsion of the contents of the womb of a pregnant woman at any period of gestation short of the full term. To cause abortion is unlawful, unless it is done in good faith for the purpose of saving the life of the mother. As to the medical aspects of abortion, see Luff, *Forensic Medicine* (1895), vol. ii. pp. 173-187; Taylor, *Medical Jurisp.*, 5th ed. (1905).

1. Any pregnant woman who, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any instrument, or other means whatsoever, is guilty of felony. This offence was first created by 24 & 25 Vict. c. 100, s. 58.

2. Whosoever, with intent to procure the miscarriage of any woman, *whether pregnant or not*, unlawfully administers to, or causes to be taken by, her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever, is guilty of felony (24 & 25 Vict. c. 100, s. 58), re-enacting 7 Will. IV. & 1 Vict. c. 85, s. 6, with the addition of the words in italics.

Offences 1 and 2 are punishable by penal servitude for life or not less than three years, or by imprisonment for not more than two years with or without hard labour (24 & 25 Vict. c. 100, s. 58; 54 & 55 Vict. c. 69, s. 1); and are not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

A thing to be "noxious" must be such as, in the quantity administered or taken, is capable of causing harm (*R.* v. *Cramp*, 1880, 5 Q. B. D. 307; *R.* v. *Hennah*, 1877, 13 Cox C. C. 547). Manual delivery is not necessary to constitute "administration," nor need the accused be present when the substance is actually taken (see *R.* v. *Wilson*, 1857, 26 L. J. M. C. 18). Actual reception into the system is not necessary to constitute the offence (*R.* v. *Walford*, 1899, noted in Arch. Cr. Pl., 23rd ed., 827). Where an instrument is used which might be innocently employed, the intention of the accused may be proved by evidence of his causing other miscarriages by the same means (*R.* v. *Dale*, 1889, 16 Cox C. C. 703; and see Arch. Cr. Pl., 23rd ed., 308, *et seq.*).

The decisions on this and prior Acts are given in detail in 3 Russ. on *Crimes*, 6th ed., 218; and in Arch. Cr. Pl., 23rd ed., 826. See also Mayne, *Criminal Law of India* (ed. 1896), p. 629.

3. Procuring the abortion of a quick child is said to be a common-law misdemeanor (Hawk., P. C., bk. i. ch. 3, s. 16; 3 Co. Inst. 51); and is murder, if the child is born alive but dies in consequence of its premature birth, or of the means employed (*R.* v. *West*, 1848, 2 Car. & Kir. 784; 3 Russ. on *Crimes*, 6th ed., 6, 218). Whoever by unlawful attempts to cause abortion kills the mother is guilty of murder (*Tinkler's Case*, 1781, 1 East, P. C., c. 8, s. 17, p. 230). But a person who obtains a noxious substance for a woman at her request, to procure her own miscarriage, which she takes with fatal results, has been held not to be an accessory before the fact to murder (*R.* v. *Fretwell*, 1862, L. & C. 161).

4. The general law as to accessories applies to these offences (see ACCESSORY). A woman who is pregnant may be convicted for conspiracy with others to procure her own miscarriage (*R.* v. *Whitchurch*, 1890, 24 Q. B. D. 420).

5. It is a misdemeanor to supply or procure any poison or noxious thing, or any instrument or thing whatsoever, with knowledge that it is meant to be unlawfully used with intent to procure the miscarriage of any woman, whether she is with child or not (24 & 25 Vict. c. 100, s. 59). The offence is punishable by penal servitude from three to five years, or imprisonment for not more than two years with or without hard labour (54 & 55 Vict. c. 69, s. 1), and is triable at Quarter Sessions. See QUARTER SESSIONS. This section has been held to apply, although the felonies under 24 & 25 Vict. c. 100, s. 58, are not committed or attempted, or even contemplated, except by the person procuring or supplying the means (*R.* v. *Hillman*, 1864, 33 L. J. M. C. 60); but this decision has been subjected to criticism in colonial decisions on similar enactments. See *R.* v. *Hyland*, 1898, 24 Vict. L. R. 101; *R.* v. *Sculley*, 1903, 23 N. Z. L. R. 380.

About.—When in a contract of sale the statement of the quantity to be delivered is qualified by the addition of such words as "about," "say about," "more or less," the vendor is allowed a reasonable latitude in performance, unless, on a proper construction, such terms are to be regarded as words of contract and not merely of estimate and expectation (*M'Connel* v. *Murphy*, 1873, L. R. 5 P. C. 203; *Alcock* v. *Leeuw*, 1883, 1 Cab. & E. 98). In *Morris* v. *Levison*, 1876, 1 C. P. D. 155, a charter-party provided that the ship should proceed to the port of lading, and there load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons. It was held that the words "say about 1100 tons" were not mere words of expectation but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity, but that 3 per cent. was a fair amount of excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by 53 tons. See *Miller* v. *Borner*, [1900] 1 Q. B. 691; and for the meaning of "thereabouts," *The Resolven*, 1892, 9 T. L. R. 75. See also Stroud's *Judicial Dictionary, in loc.*

Abridgment (a Digest or Epitome).—The title used by a number of eminent writers to describe their digests of the laws of England. The most famous and authoritative works of this description are:—

Statham's *Abridgment*, temp. Edw. IV.—Statham was a Baron of the Exchequer; his work contains cases from the year-books, arranged under titles down to the end of the reign of Henry VI., and, according to Bridgman (*Legal Bibliography*, 1807), it is evidently the first attempt made to methodise our law as contained in the decisions from the reign of Edward I. in the Courts of law, and it contains many original authorities not extant in the year-books of those times. It was printed in French, quarto, without title, date, or author's name, but is supposed to have been printed by Wm. La Tailleur at Rouen, for Pynson, between 1470 and 1490.

Fitzherbert's *Grand Abridgment*, temp. Hen. VIII.—Published in 1514; a digest of the substance of the year-books down to 21 Henry VII.

Brooke's *Grand Abridgment*.—First printed in quarto, French, 1568. The author, Sir Robert Brooke, was Chief Justice of the Common Pleas in 2 Ph. & Ma. Like Fitzherbert's work, on which it is principally

founded, it consists of a digest of the year-books. It comes down to Elizabeth.

Rolle's *Abridgment of Cases and Resolutions of the Law*, temp. Chas. II. —Published, with a Preface by Sir Matthew Hale, in 1668. Rolle was Chief Justice of England under the Commonwealth.

Viner's *Abridgment: a General and Complete Abridgment of Law and Equity*, in 24 vols. fol.; published from 1741-51.

Comyn's *Digest of the Laws of England*, in 5 vols. folio.—Sir John Comyn was Chief Baron of the Exchequer, and died in 1740. His Digest was not published till after his death—the first volume being published in 1762. It is universally recognised to be the best and most authoritative of all works of the kind. Mr. Hargrave, in his notes to Co. Litt. (17*a* *n* (1)), says: "The whole of this work is equally remarkable for its great variety of matter, its compendious and accurate expression, and the excellence of its methodical distribution." A fifth edition by Hammond was published in 1822.

Bacon's *New Abridgment*.—The first volume of the first edition appeared in 1736. It is supposed by Sir William Blackstone to have been compiled chiefly from materials collected by Lord Chief Baron Gilbert.

Cruise's *Digest of the Laws of England respecting Real Property*, in 7 vols., 1804-7.

Among compilations of a similar kind, but of little note, are:—

D'Anver's *General Abridgment of the Common Law*, 2 vols., 2nd ed., 1725.—It is practically a translation of Rolle's.

Nelson's *Abridgment of the Common Law*, 3 vols., 1725.

Petersdorff's *Abridgment of the Common Law*, 15 vols., 1st ed., 1825.

From early times there have been a number of Abridgments of the Statute Law.

The earliest, so far as is known, is one printed by Lettou & Machlinia in French, down to 31 Hen. VI. It is probably the earliest printed law book, except Littleton's *Tenures*.

The first English Abridgment of the Statutes was printed in 1519 (11 Henry VIII.), by John Rastall.

For a complete account of the various works of this kind, see Bridgman's *Legal Bibliography*, p. 328, and Marvin's *Bibliography*.

Apart from these so-called abridgments or digests, we have, in the nature of institutional writings, a series of historic treatises, which aim at presenting more or less a statement of the whole law. The most celebrated need alone be here referred to:—

Glanville's *Tractatus de Legibus Angliæ*, composed in the reign of Henry II., is one of the oldest, and, although now obsolete for practical purposes, is of antiquarian importance.

Henry III.'s reign produced Bracton, *De legibus et consuetudinibus Angliæ*, a systematic and complete view of the law in all its titles as it stood at the time it was written (Reeve, *Hist. Eng. Law*, i. 529, Finlayson's ed.). "Bracton's book is the crown and flower of English mediæval jurisprudence" (Pollock and Maitland, *Hist. Eng. Law*, i. p. 185). The main part of the book seems to have been written between 1250 and 1258.

The works known as *Fleta* and *Britton* appeared about 1290, Edward I. *Fleta seu Commentarius juris Anglicani* purports to be a treatise upon the whole law based upon Bracton. *Britton* is a small work in French.

To the reign of Edward II. is usually attributed the *Mirror of Justice*. It deals with all branches of the law, civil and criminal.

In the reign of Henry VI. appeared Sir John Fortescue's treatise, *De laudibus Legum Angliæ*. It is in the form of a dialogue between him and the young prince.

In the reign of Henry VIII. there appeared Perkins' treatise of the laws of England, pronounced a good authority by Lord Mansfield; and the *Dialogue between a Doctor of Divinity and a Student in Law*, written by St. Germain. A 17th ed. was published in 1787. It is also considered a good authority.

For the rest it will suffice here to mention Staundforde, who wrote on the *Pleas of the Crown* in French, under Ph. & Ma.; Lord Bacon, who published *Elements of the Common Law;* and Lord Coke's celebrated *Institutes*, temp. James I.

Of the older Law Dictionaries the best known are:—

Spelman's *Glossary*, 1626; Cowell's *Law Dictionary; or the Interpreter of Words and Terms used either in the Common or Statute Law and in the Tenures*, 1st ed., temp. James I.; Blount, *Law Dict.*, 1670; Burn, *Law Dict.*, 2 vols., 1792; Jacob, *Law Dict.*, 1729; Tomlin, *Law Dict.*

Abridgment of Time.—See TIME.

Abroad, Bankruptcy Proceedings.—See BANKRUPTCY.

Abroad, Citation, etc., Service of. See DIVORCE.

Abroad, Offences committed.—By the common law no offence committed outside the body of the realm was triable *in pais*. The rules as to venue (*q.v.*) made all common law offences local. Offences within the jurisdiction of the Admiralty were triable under the civil law; and the now obsolete Court of the Constable and Marshal had jurisdiction to try certain offences on land abroad (see Ph. & 2 Ma. c. 10, s. 6; *Lord Rea's Case*, 1631, 3 St. Tri. 483).

1. As to offences committed on the sea or on a British ship, see *R.* v. *Keyn*, 1876, 2 Ex. D. 63; the Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict. c. 73; the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, ss. 684-689; and ADMIRALTY DIVISION; BRITISH SHIP.

2. The Courts of England have also jurisdiction to try offences committed outside England, in the following cases:—(1) Treason, misprision of treason or concealment of treason outside the United Kingdom, by a British subject (35 Hen. VIII. c. 2, s. 1; 5 & 6 Edw. VI. c. 11; *R.* v. *Lynch*, [1903] 1 K. B. 744), and treason-felony wherever committed (11 & 12 Vict. c. 12, s. 3). (2) Offences by a British subject against the Explosives Act, 1883, committed outside the King's dominions (45 & 46 Vict. c. 3). See EXPLOSIVES. (3) Offences against the Foreign Enlistment Act, 1870, committed in any part of the King's dominions (33 & 34 Vict. c. 90, s. 16; *R.* v. *Jameson*, [1896] 2 Q. B. 425; *R.* v. *Sandoval*, 1887, 16 Cox C. C. 206). See FOREIGN ENLISTMENT. (4) Offences against the Official Secrets Act, 1889, committed in any part of the King's dominions, or by British officers or subjects elsewhere (52 & 53 Vict. c. 52, s. 6). See OFFICIAL SECRETS. (5) Misdemeanors by British officials who are in public employment outside Great Britain (11

Will. III. c. 12; 10 Geo. III. c. 47, s. 4; 42 Geo. III. c. 85; *R.* v. *Shawe*, 1816, 5 M. & S. 403; *R.* v. *Eyre*, 1868, L. R. 3 Q. B. 487), including, it would seem, offences in foreign countries. (6) Murder or manslaughter on land outside the United Kingdom by a British subject, or being accessory (*q.v.*) thereto (24 & 25 Vict. c. 100, s. 9; *R.* v. *Bernard*, 1858, 1 F. & F. 240). (7) Offences committed by British subjects in India (13 Geo. III. c. 63, s. 39; 25 Geo. III. c. 37. See Ilbert, *Government of India*, pp. 259-265; *Douglas* v. *R.*, 1848, 3 Cox C. C. 163). (8) Offences against the Dockyards, etc., Protection Act, 1772, 12 Geo. III. c. 24; the Incitement to Mutiny Act, 1797, 37 Geo. III. c. 70; and the Unlawful Oaths Acts, 1797, 37 Geo. III. c. 123, s. 6, and 1812, 52 Geo. III. c. 104. (9) Offences against the Slave Trade Acts, 5 Geo. IV. c. 114, s. 9. See SLAVE TRADE. (10) Offences against the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, s. 684. (11) Bigamy by a British subject in any part of the world (24 & 25 Vict. c. 100, s. 57). See BIGAMY; and see *Macleod's Case*, [1891] App. Cas. 455; *Lemesurier* v. *Lemesurier*, [1895] App. Cas. 517. (12) Perjury and forgery, punishable under the Commissioners of Oaths Act, 1889, committed within or without the King's dominions (52 & 53 Vict. c. 10, s. 9), and perjury committed before a Naval Court Martial (Naval Discipline Act, 1866, 29 & 30 Vict. c. 109, s. 67). (13) Offences against the Foreign Marriage Act, 1892, 55 & 56 Vict. c. 23, s. 15.

Larceny committed abroad is not triable in England; but possession in the United Kingdom of property stolen, etc., abroad is punishable under the Larceny Act, 1896, 59 & 60 Vict. c. 52; and receipt in one part of the United Kingdom of goods stolen in another part is punishable under sec. 114 of the Larceny Act, 1861, 24 & 25 Vict. c. 96.

The venue and Court for the trial of these offences is in each case specified by the statute authorising the trial. See Arch. Cr. Pl., 23rd ed., 37-43.

Abroad, Parties, etc., resident.—See COMMISSION, EVIDENCE ON.

Abroad, Property situate.—See BANKRUPTCY.

Abroad, Service.—See SERVICE OUT OF THE JURISDICTION.

Abroad, Wills made Probate of.—See PRIVATE INTERNATIONAL LAW; PROBATE; WILLS.

Absconding Debtor.—See BANKRUPTCY.

Absconding Trustee.—See TRUSTS.

Absence beyond Seas.—Under the common law, "beyond the seas" meant out of the realm or power of the King of England, as to his crown of England (*Lane* v. *Bennett*, 1836, 1 Mee. & W. 70).

In the construction of the Statutes of Limitation of 21 Jac. I. c. 16, and 4 Anne, c. 16, the expression has been construed to mean out of Great Britain (*King* v. *Walker*, 1761, 1 Black. W. 286). So that, while Scotland was held not to be beyond the seas, Ireland, on the other hand, was held to be beyond the seas (*Lane* v. *Bennett*, *supra*).

The Statutes of Limitation—21 Jac. I., relating to personal actions on simple contract and tort; 3 & 4 Will. IV. c. 27, to real property; and 3 & 4 Will IV. c. 42, to actions on specialties—provided that absence beyond seas should be one of the grounds of a plaintiff's disability prolonging the various periods prescribed for bringing actions in accordance with those various statutes.

The Statute 4 Anne, c. 16, provided for the case of the absence beyond seas of a defendant, which had been held not to fall within the Statute of James I. Sec. 19 enacted that, in actions governed by the latter statute, or for the recovery of seamen's wages under the then enacted Act, if the defendant or defendants should, at the time of such action accrued, be fallen or come beyond the seas, then such action might be brought after the return of the defendant or defendants, within such times as are limited by the Act of James I. The statute does not run against the creditors of a person beyond seas, notwithstanding the provisions of Order 11 as to service of writs out of the jurisdiction. Nor does it run against the creditors of an ambassador during the time he is accredited, and for such a reasonable time afterwards as will enable him to wind up his official business, even if his successor is duly accredited during that time (*Musurus Bey* v. *Gadban*, [1894] 1 Q. B. 533; 2 Q. B. 352).

Similarly, sec. 4 of 3 & 4 Will. IV. c. 42, provides for bringing actions against persons who return from beyond seas. Sec. 7 also enacts that, in regard to such actions on specialties and actions governed by the Act of James I., "beyond the seas" shall mean beyond the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and any islands adjacent to any of them being part of the dominions of the Crown. This definition is extended to the Statute of 4 Anne, c. 16, by sec. 12 of the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97.

Under the Real Property Limitation Acts, the absence of the defendant beyond seas does not extend the time allowed by those Acts for taking proceedings.

In the case of plaintiffs, absence beyond seas no longer exists as a disability under any of the above statutes, for by sec. 10 of the Mercantile Law Amendment Act, 1856, whether one or more of the persons entitled to sue are absent, the period of limitation is not on that account extended.

Where there are two or more joint debtors, one or more of whom are beyond seas at the time the cause of action accrued, judgment obtained against the other co-debtors does not, of itself, discharge the joint debtor or debtors beyond the seas from being sued on his or their return—an exception to the ordinary rule (*Kendall* v. *Hamilton*, 1879, 4 App. Cas. 504). But the person entitled to the action has no additional time for the absence beyond seas, as against the co-debtors not so absent (Mercantile Law Amendment Act, 1856, s. 11).

Quære, Whether this section includes any cause of action but actual debt (Darby and Bosanquet, *Statutes of Limitation*, p. 61).

Time begins to run if the defendant returns for ever so short a time, even without the plaintiff's knowledge (*Gregory* v. *Hurrill*, 1826, 5 Barn. & Cress. 341).

The rules of limitation being rules of procedure, Englishmen and foreigners are on the same footing; even if the foreigner has never been

in this country (*Strithorst* v. *Graeme*, 1770, 2 Black. W. 723; and *Lafond* v. *Ruddock*, 1853, 13 C. B. 813).

If the cause of action has arisen abroad and the defendant remains beyond seas, and then either arrives here for the first time, or returns after the period of limitation, the plaintiff has the additional time for suing, if the right itself is not extinguished (*Williams* v. *Jones*, 1811, 13 East, 439; 12 R. R. 401).

The plaintiff must specially reply the absence of defendant.

See LIMITATION; PRESCRIPTION.

Absence for Seven Years.—See BIGAMY.

Absence of Accused.—1. In prosecutions for treason and felony the accused must be present for his arraignment and throughout all the proceedings, both on the preliminary inquiry (11 & 12 Vict. c. 42, s. 17) and at the trial of the indictment, when he is given in charge to the jury, and up to judgment. If he falls ill, the jury must be discharged and a new trial ordered (*R.* v. *Stevenson*, 1791, Leach, 2nd ed., 443). In his absence the trial cannot proceed; but the process of outlawry may be resorted to. See OUTLAWRY. If he creates a disturbance during his trial it is said that the trial may proceed in his absence (Arch. Cr. Pl., 23rd ed., 186; Bowen-Rowlands, *Cr. Proceedings*, 72).

2. In the case of an indictable misdemeanor the accused must be present at the preliminary inquiry (11 & 12 Vict. c. 42, s. 17), but his presence at the trial is not absolutely necessary for its validity, nor is he given in charge to the jury (3 Co. Inst. 110; Arch. Cr. Pl., 23rd ed., 186, 207, 215). He is usually required to be present to receive judgment, unless he is too ill to come or the penalty to be imposed is only a fine. If he does not appear, process will issue to compel his appearance (*R.* v. *Chichester*, 17 Q. B. 504*n*; Arch. Cr. Pl., 23rd ed., 227).

3. On application for a new trial in a criminal case, the defendant, if not in custody, and liable to more than a fine, must be present, unless the Court otherwise orders (*R.* v. *Caudwell*, 1851, 17 Q. B. 503; Crown Office Rules, 1886, r. 169), and a like rule applies in the case of a writ of error in a case of misdemeanor (*Murray* v. *R.*, 1845, 7 Q. B. 700; *Howard* v. *R.*, 1865, 10 Cox C. C. 54; Crown Office Rules, 1886, rr. 187-191; Short and Mellor, *Crown Office Practice*, 252, 320-326); and in the case of a writ of error in felony, the Court may dispense with the attendance of the plaintiff in error if he is in prison (*Richards* v. *R.*, [1897] 1 Q. B. 574).

4. If a defendant does not appear personally, or by counsel or solicitor (*Bessell* v. *Wilson*, 1853, 22 L. J. M. C. 94), to a summons duly served on him for an offence punishable on summary conviction, a Petty Sessional Court may proceed *ex parte* on the information, if satisfied by evidence that the summons has been properly served on him, or has come to his knowledge, and may adjudicate as fully as if the defendant had personally appeared (11 & 12 Vict. c. 43, s. 2). In practice it is inexpedient to pursue this course (*R.* v. *Smith*, 1866, L. R. 10 Q. B. 608), and it is seldom followed except in proceedings before justices on complaint for matters in the nature of civil debts.

Absence without Leave (Offence of).—See SEAMAN.

Absent Parties.—See PARTIES.

Absents.—See BANKRUPTCY.

Absolute Bills of Sale.—See BILLS OF SALE.

Absolute Privilege.—See PRIVILEGE.

Absolutely entitled.—This expression is used in Lands Clauses Consolidation Act, 1845, s. 69; Leases and Sales of Settled Estates Act, 1856, s. 23 (repealed), which Act was applied to the Partition Act, 1868, by sec. 8 of that Act; the Settled Estates Act, 1877, s. 34; Settled Land Act, 1882, s. 21 (ix.), which adds "or entitled to give an absolute discharge;" the Trustee Act, 1850, ss. 23, 24 (repealed); and the Trustee Act, 1893, s. 35 (1). Secs. 2 (8) and 39 of the Settled Land Act, 1892, and the Settled Land Act, 1890, s. 14, must also be considered.

Leading cases under the Lands Clauses Act and the Settled Land Act, are: Discretion of Court. *In re Smith*, 1889, 40 Ch. D. 386; and *In re Wootton's Estate*, 1890, W. N. 158. Charity Trustees. See *In re Spurstowe's Charity*, 1874, L. R. 18 Eq. 279; and *Ex parte Norfolk Clergy*, 1882, W. N. 53, in which Fry, J., refused to follow the former case, and ordered the funds to be invested in consols and the dividends to be paid to the treasurer for the time being. Trustees of a charity, with power to sell and to give a full discharge for the money paid, are "absolutely entitled" (*In re Lord Mayor of Sheffield and the Trustees of St. William's R. C. Chapel and Schools, Sheffield*, [1903] 1 Ch. 208). A tenant for life is not entitled to any money paid by a railway company in respect of minerals under the settled estate, whatever the life of the mine (*In re Robinson's Settlement Trusts*, [1891] 3 Ch. 129). Under the Trustee Acts, the expression included new trustees, but not a sole trustee, nor a tenant for life unless only applying for dividends.

Abstract of Indictment.—It is well established practice for the Clerk of the Court or the prosecutor to prepare and file for the use of the judge an abstract of every indictment presented at any Court of criminal jurisdiction.

FORM OF ABSTRACT.

Abstract of Indictment for obtaining Credit by False Pretences and by Fraud other than False Pretences.

Count 1.	that A. B.	on 11 Nov. 1905	did falsely pretend to	C. D.	that [set out the false pretences]	by means of which false pretences he did then obtain from one	C. D.	£50	with intent thereby then to defraud, whereas in truth and in fact, etc.
2.	,,	15 Nov. 1905.	,,	E. F.	[set out false pretences]	,,	E. F.	£100	,,
3.	,,	15 Nov. 1905	in incurring a certain debt and liability of		£50	to E. F.	unlawfully and fraudulently did obtain credit,	to wit, credit for the said amount,	by means of fraud other than false pretences.

Abstract of Title.—A concise statement of the instruments and events under and by means of which a person derives his title to property. It is usually prepared by the owner's solicitor on the occasion of a sale or mortgage of land, and delivered to the purchaser's or mortgagee's solicitor, for the purpose of enabling him to judge whether the title is satisfactory. See CONVEYANCING PRACTICE.

The right to an abstract of title is implied in every contract for the sale of land, unless excluded by express stipulation (see Sugden, *Vendors and Purchasers*, 14th ed., 406), so that, if an abstract is not delivered within a reasonable time, the purchaser may rescind (see *Compton* v. *Bagley*, [1892] 1 Ch. 313); and, in the case of an intended mortgage, it is the practice to require an abstract, just as in the case of a sale under an open contract.

The duty falls on the solicitor preparing the abstract, of carefully perusing all the deeds, wills, and other instruments relating to the title to be shown, and of setting out their material parts in the abstract. Recitals of deeds and wills which are abstracted in chief need only be referred to, but all recitals of instruments which are not abstracted in chief, and all recitals of material facts, should be set out fully, and the exact words of grant, limitation, or devise, and of any powers which have been exercised, should be given in every case. The parcels in each deed should, so far as they relate to the property, be copied *verbatim*, except where the description is the same as in a previously abstracted deed, in which case a statement that they are the premises so described is sufficient. Tracings of all plans on the deeds should also accompany the abstract for the purpose of identifying the property. Abstracts are often imperfectly prepared in this respect, but it is conceived that a vendor is as much bound to furnish a tracing of a plan on a deed as he is to set out the description of the parcels in the operative part (see *Brown* v. *Wales*, 1872, L. R. 15 Eq. 142). The instruments should be abstracted in chronological order, except in the case of a will, which should be placed immediately before the date of the testator's death; while statements of marriages, births, deaths, heirships, and other facts on which the title depends, should be inserted in their proper places in order of time. A perfect abstract will thus give a complete history of the title from the time fixed for its commencement up to the date of its delivery, showing not only the vendor's interest in the property, but also any incumbrances or other interests to which it may be subject.

In the case of registered land, the right to an abstract is limited by the Land Transfer Act, 1897. If registered with an absolute or qualified title, only the land certificate and the title to any incumbrance existing at first registration and to any estate or interest excluded from the effect of registration need be abstracted; but if registered with a possessory title, an abstract should be furnished of the title prior to registration as well as of the land certificate (see 60 & 61 Vict. c. 65, s. 16).

A solicitor who fraudulently conceals any material instrument or any incumbrance, or falsifies any pedigree, to induce a purchaser or mortgagee to accept the title, is guilty of a misdemeanor, besides being liable to an action for damages (22 & 23 Vict. c. 35, s. 24; 23 & 24 Vict. c. 38, s. 8). The question has, however, been raised, whether it is proper to abstract instruments creating merely equitable interests, which,

if undisclosed, would not affect the purchaser's title. In the case of an instrument merely relating to the beneficial interest in a mortgage debt, which is not noticed in the mortgage, it seems undesirable to abstract it; the general practice being to keep notice of the trust off the title. So, in the case of a separate declaration of trust by a person to whom the property has been conveyed as absolute owner, it is unnecessary to abstract it, if not referred to in the conveyance, unless the trustee has died or become bankrupt; but in either of these cases the title cannot be properly traced without disclosing the trust. Equitable charges stand on a distinct footing, as it is seldom intended to allow the borrower's power of disposition to remain intact; moreover, where there has been a prior mortgage to a building society, which has been discharged by a statutory receipt since the date of the charge, it may have become clothed with the legal estate; or if the charge is within sec. 11 of the Act, 23 & 24 Vict. c. 145, the holder may be able to pass the legal estate by exercising his power of sale. It has been laid down that an equitable charge ought to be disclosed, even though it has been paid off (see *Drummond* v. *Tracy*, 1860, John. 608); and it is conceived that the proper course is to abstract such charges, whether subsisting or not. Perhaps the one exception which may be safely made to this rule, is in the case of an informal charge given by the vendor to his solicitor to secure an advance which is intended to be paid off out of the purchase-money on completion (see Dart, *Vendors and Purchasers*, 7th ed. 337).

A practice appears to have sprung up of not abstracting in chief, wills which are recited in later deeds. This is objectionable where other parts of the recited will affect the construction, and in any case the practice is inconvenient and should not be followed, as a purchaser is entitled to have every instrument through which the title is traced abstracted in chief, whether the original is or is not in the vendor's possession (see *In re Johnson and Tustin*, 1885, 30 Ch. D. 42); even in the case of a will (see *In re Stamford, etc., Co. & Knight*, [1900] 1 Ch. 287); although in the case of a simple devise, fully abstracted by way of recital, the abstract has been held to be sufficient (see *In re Ebsworth and Tidy*, 1889, 42 Ch. D. 23). No abstract is required of expired leases, but leases which have been determined by surrender or by proceedings in ejectment should be abstracted, together with the surrender or the pleadings and judgment in the action.

It is the duty of the solicitor acting for the purchaser or mortgagee, to examine the abstract with the original deeds, probates of wills, and office copies of instruments of record, and to set out any material clauses which have been omitted from the abstract, correct any mistakes, and mark the stamps in the margin. He should notice by whom each deed is executed, and if by only some of the parties, should insert their names in the foot-note; if any party has executed by attorney, it should be so stated, and the reference to the power set out; and any want of a seal should also be recorded. In the case of appointments under powers he should note the number of attesting witnesses, and in the case of wills should set out their names. Interlineations and alterations should be noted in the margin of the abstract; and generally it should be seen that nothing affecting the title is omitted. For the efficient performance of this duty, the person examining the abstract should not only have made himself acquainted with the title, but should also be competent to

judge of the materiality of every clause in the various instruments; hence, if the examination is left to a clerk not possessing the requisite knowledge and experience, a serious risk is incurred, not only by the client, but also by the solicitor, who is liable for any damage sustained by his negligence in investigating the title (see *Whiteman* v. *Hawkins*, 1878, 4 C. P. D. 13).

The expense of production of any deeds not in the vendor's possession is thrown on the purchaser by sec. 3 of the Conveyancing Act, 1881, even where they are in the possession of a mortgagee (see *In re Willett and Argenti*, 1889, 60 L. T. 735).

Except in cases where the property is of small value, the abstract is usually laid before counsel to advise on the title; and although this is sometimes deferred until after the abstract has been examined, it is believed that counsel's opinion is more commonly taken before the examination; a course which probably saves time and expense by rendering a re-examination of the abstract unnecessary, though it may necessitate a further opinion as to the effect of any alterations made or fresh matter introduced on examination.

In advising on title, it makes but little difference whether a sale or mortgage is contemplated, as practically the same considerations apply in both cases; a mortgagee usually requiring such a title as could be forced on a purchaser under an open contract. In the following remarks, it has therefore been thought sufficient to deal with the case of an abstract delivered on the occasion of a sale.

The duty of the purchaser's counsel in perusing the abstract is to see that it commences with a good root of title of sufficient age, and that the subsequent title is deduced without any break, and shows that the vendor has power to convey the property purchased for the estate mentioned in the contract. If this appears by the abstract, he has next to see that all the abstracted instruments and facts are duly verified; but the mere existence of some defect in the evidence will not render the title unsatisfactory, provided it is not serious enough to throw doubt on the right to hold the property.

In the absence of any stipulation limiting the purchaser's rights, the title to freeholds should commence with an instrument dated at least forty years before the contract (see Vendor and Purchaser Act, 1874, s. 1). Enfranchised copyholds form an exception to the rule, the purchaser being precluded by Statute from calling for the title to make the enfranchisement (see Conveyancing Act, 1881, s. 3); but he is entitled to have the copyhold title shown for the full period. A conveyance on sale or a legal mortgage in fee is a good root of title; and a voluntary settlement, appointment, or disentailing deed would seem to be sufficient, if of the requisite age (see 1 Preston, *Abstracts*, 2nd ed., 7); though probably none of these instruments, if less than forty years old, would be made a good root of title by a condition which did not disclose its nature (see *In re Marsh and Granville*, 1883, 24 Ch. D. 11). A general devise in a will is insufficient as a root of title without evidence of the testator's seisin (*Parr* v. *Lovegrove*, 1857, 4 Drew, 170; 62 E. R. 66); but a specific devise seems to be sufficient (see 1 Preston, *Abstracts*, 17).

In the case of leaseholds, the title should commence with the lease, even though more than forty years old, as this was an exception to the old rule restricting the title to sixty years (see *Frend* v. *Buckley*, 1870,

L. R. 5 Q. B. 213), and is therefore not affected by the Vendor and Purchaser Act, 1874; but a purchaser has no right to require the title between the lease and the last forty years to be shown (*Williams* v. *Spargo*, W. N., 1893, 100); nor can he require the title to the reversion, whether the lease be a head-lease or an under-lease (see Vendor and Purchaser Act, 1874, s. 2; Conveyancing Act, 1881, s. 3; *Gosling* v. *Woolf*, [1893] 1 Q. B. 39).

After seeing that the root of title is satisfactory, it must next be considered whether the subsequent title is regularly deduced. For this purpose it is necessary to form an opinion as to the legal effect of every instrument and fact forming a link in the chain of title; but before the legal effect of any instrument can be determined, the intention of the parties must be ascertained: a question of construction which depends on the whole instrument, whether it be a deed or will. And here the importance of the examination of the abstract appears; for the omission of a single sentence may result in a wrong conclusion being arrived at. In one case, where an advance on the security of a married woman's interest under a will was contemplated, an abstract of the devise was furnished, which omitted the clause restraining her from anticipation; the omission was not noticed by the solicitor's clerk who examined the abstract with the probate, and the mortgagees in consequence lost their security.

It is important to observe which of the parties have executed the various deeds; and for this purpose the names given at the commencement of each abstracted instrument cannot be relied on, but recourse must be had to the foot-note at the end; and if any granting party appears not to have executed it, the grant purporting to be made by him must be treated as a nullity. If any conveyance appears to be not under seal, it must not be treated as passing more than an equitable interest, notwithstanding a full attestation clause, testifying to its having been sealed and delivered (see *National Provincial Bank* v. *Jackson*, 1886, 33 Ch. D. 1). The fact of the grantee not executing the deed is immaterial; indeed, the grant may be valid though he be not named a party to the deed (see 8 & 9 Vict. c. 106, s. 5).

An abstract should be required of every recited instrument which appears to affect the property, except in the case of any prior to the root of title (see Conveyancing Act, 1881, s. 3); but where it cannot be gathered from the recital whether the instrument does or does not affect the property, although the question should be asked, an answer that it does not relate must be accepted (see *Patman* v. *Harland*, 1881, 17 Ch. D. 353). Evidence should also be required of any material facts disclosed by the recitals, unless prior to the root of title (see Conveyancing Act, 1881, s. 3), except in the case of recitals which are contained in a deed twenty years old (see Vendor and Purchaser Act, 1874, s. 2), or which merely relate to payment of the consideration (see *Rimmer* v. *Webster*, [1902] 2 Ch. 163), or recitals introduced for the purpose of keeping notice of a trust off the title, *e.g.* a recital that the grantee is entitled in equity (see *In re Harman & Uxbridge Railway Co.*, 1883, 24 Ch. D. 720); but where the trusts are disclosed, the beneficial title has to be inquired into (see *In re Blaiberg & Abrahams*, [1899] 2 Ch. 340).

It should also be observed whether the consideration purports to be paid to the persons entitled to receive it. If paid to trustees, it should be shown that they had power to give a receipt; or if paid under an

order of Court, that the terms of the order have been followed. There should be seen to be an indorsed receipt for the consideration, unless its payment is recited, or there is a receipt in the body of the deed; the latter being made sufficient in the case of deeds executed after 1881 by sec. 55 of the Conveyancing Act, 1881, and in the case of earlier deeds by sec. 2 of the Vendor and Purchaser Act, 1874. If the receipt in the body of the deed is relied on, it should be seen to be in proper form (see *Renner* v. *Tolley*, 1893, 68 L. T. 815). If there is no consideration, inquiry should be made whether the grantor executed any subsequent conveyance for value before the Voluntary Conveyances Act, 1893, 56 & 57 Vict. c. 21, and search should be made against him in bankruptcy for the ten years following the deed; but if the grantee under a voluntary deed conveys the property to a purchaser before the grantor becomes bankrupt, the subsequent bankruptcy of the grantor is immaterial (see *In re Carter & Kenderdine*, [1897] 1 Ch. 776, overruling *In re Briggs & Spicer*, [1891] 2 Ch. 127).

In determining the legal effect of any conveyance, it must also be considered whether the grantor had the estate he purported to convey; whether he was under any disability which would prevent him from passing it; and whether he had power to dispose of the beneficial interest. It sometimes happens that the grantor's name is altogether omitted in the operative part of a deed, a defect which prevents the estate passing unless the intention is clear (see *Dent* v. *Clayton*, 1864, 12 W. R. 903). But the omission of the grantee's name in the operative part is of no importance, provided the estate be limited to him in the habendum; so, its omission from the habendum is immaterial, if there is a valid grant to him in the operative part (see 3 Preston, *Abstracts*, 27, 39).

The capacity of the grantee to take must also be considered; and in this connection it must be remembered that freeholds could not be granted by a man to his wife, or by a wife to her husband, until the law was altered by sec. 50 of the Conveyancing Act, 1881; and that leaseholds could not be assigned by a man to his wife before the Married Women's Property Act, 1882, came into operation (see *Baddeley* v. *Baddeley*, 1878, 9 Ch. D. 113). So, it must be borne in mind that if a man assigned leaseholds to himself and others before the passing of the Law of Property Amendment Act, 1859, the whole estate vested in the others (see 22 & 23 Vict. c. 35, s. 21); while a similar grant of freeholds had a similar effect until the Conveyancing Act, 1881, came into operation (see s. 50). It must further be noticed whether any circumstances are disclosed making it inequitable for the grantee to acquire the estate, as in the case of a trustee for sale purchasing from his co-trustees, in which case a deed of confirmation from the beneficiaries should be required (see *Williams* v. *Scott*, [1900] A. C. 499).

The next thing to be ascertained is that the property is comprised in each deed through which the title is traced; and for this purpose the plans on the deeds must be carefully examined. If the plan differs from the parcels it must be considered which contains the governing description (see *Horne* v. *Struben*, [1902] A. C. 454). Where the plans do not show enough to identify the property, this may sometimes be done with the aid of the ordnance map. If there are no plans on the deeds, old leases and assessments to the poor-rate and land-tax may have to be resorted to for establishing the identity; but, in such cases, a statutory declaration by some person acquainted with the property,

that it has been enjoyed, according to the title shown, for the last twelve years or more, is usually required. Any reservations or exceptions from the parcels must be considered, to see that they do not affect the property purchased.

The words of limitation must be carefully noticed, remembering that until the Conveyancing Act, 1881, came into operation, an estate of inheritance would not pass without the word "heirs," and that now a limitation to the grantee and his heirs, or "in fee-simple," is necessary to pass it (see s. 51; *In re Ethel & Butler*, [1901] 1 Ch. 945); except in the case of statutory transfers of mortgages or in certain cases where the estate is merely equitable (see *In re Whiston*, [1894] 1 Ch. 661; *In re Irwin*, [1904] 2 Ch. 752; *In re Tringham*, [1904] 2 Ch. 487; *In re Oliver*, [1905] 1 Ch. 191). In the case of leaseholds, it must be noticed whether the whole term is assigned or merely an under-lease created, bearing in mind that an under-lease for the whole term operates as an assignment (see *Beardman* v. *Wilson*, 1868, L. R. 4 C. P. 57). Where uses are declared, it must be considered whether they pass the legal estate under the Statute of Uses, or confer merely equitable interests (see *Cooper* v. *Kynock*, 1872, L. R. 7 Ch. 398); and where there are covenants for title, it must be observed whether any incumbrances are disclosed.

If the property is situate in Middlesex or Yorkshire, it must be noticed whether the foot-notes to the various deeds (including enfranchisement deeds; see *Reg.* v. *Middlesex Registrar*, 1888, 21 Q. B. D. 555) state that they are registered in the local registry; and if not, this should be required to be done by the vendor at his own expense, unless such registration is rendered unnecessary by the Land Transfer Acts.

If the property is situate in the County of London, it must be considered whether any of the deeds ought to have been registered at the Land Registry under the Land Transfer Act, 1897 (see 60 & 61 Vict. c. 65, s. 20), and the vendor should be required to remedy any defect in this respect.

In every case the stamps marked in the margin of the abstract must be checked, and any insufficiently stamped deed should be required to be duly stamped at the vendor's expense (see *Whiting to Loomes*, 1881, 17 Ch. D. 10); and if there is a condition precluding objections as to stamps, it must be considered whether it is avoided by sec. 117 of the Stamp Act, 1891.

There are many other points which commonly arise on deeds and statutory assurances by reason of the position of the parties or the nature of the instrument. Of these, it will be sufficient to give the following instances:—

Administrator.—Where an assignment of leaseholds appears to have been made by an administrator, letters of administration, dated prior to the assignment, should be produced to show that he had power to assign; and if the assignment is not for value, or is given in discharge of his own private debt, the concurrence of the next-of-kin should be shown. So where freeholds are conveyed by an administrator under the powers of the Land Transfer Act, 1897, production of the letters of administration should be required, and if there are several administrators, all should be required to join unless the Court authorises the sale (see 60 & 61 Vict. c. 65, s. 2).

Appointment.—Any appointment under a power must be seen to be

authorised by the power, for which purpose the instrument creating it should be abstracted and produced; and the appointment should also be ascertained to be attested, as prescribed by the power, or by two witnesses (see 22 & 23 Vict. c. 35, s. 12).

Attorney.—If a conveyance is executed by attorney, the power of attorney should be abstracted and produced, and shown to authorise the conveyance, and to be under seal; and the conveyance should be shown to be executed in the name of the principal, unless the case is within sec. 46 of the Conveyancing Act, 1881. If the principal is a trustee, it should be seen that the delegation of the trust is confined to execution of the deed and receipt of the purchase-money (see *In re Hetling & Merton,* [1893] 3 Ch. 269). Evidence should also be given that the principal was alive when the power was exercised, and that the power has not been revoked unless the case is within sec. 8 or sec. 9 of the Conveyancing Act, 1882.

Bankruptcy Trustees.—If a conveyance appears to have been made by a trustee in bankruptcy, the order of adjudication should be abstracted and an office copy produced, as a mere receiving order does not divest the bankrupt's estate (see *Rhodes* v. *Dawson,* 1896, 16 Q. B. D. 548). An office copy of the certificate of the trustee's appointment should also be produced, as the appointment only takes effect from the date of the certificate (see Bankruptcy Act, 1883, s. 21). If the conveyance is in exercise of a power vested in the bankrupt, it should be shown that the bankrupt was alive at the date of the conveyance (see *Nichols to Nixey,* 1885, 29 Ch. D. 1005).

Building Society.—Where a mortgage to the trustees of an unincorporated building society is vacated by their indorsed statutory receipt, it should be ascertained by inquiry at the office of the Registrar of Friendly Societies, that the society has been certified under the Building Societies Act, 1836, and not incorporated under the Building Societies Act, 1874. It should also be ascertained that the persons signing the receipt were the trustees for the time being (see 6 & 7 Will. IV. c. 32, s. 5). If they are not the same persons as the trustees to whom the mortgage was made, evidence of the death or removal of the old trustees and of the appointment of the new trustees should be given. A copy of the rules certified by the Registrar of Friendly Societies should also be furnished, to show that the receipt is in the form specified in the schedule to the rules (see s. 5). Where a mortgage to an incorporated society is vacated by an indorsed receipt, it should be seen to be under the society's common seal, countersigned by the secretary or manager, in the form given in the schedule to the Act of 1874 (see 37 & 38 Vict. c. 42, s. 42), and the fact of the society's incorporation should be ascertained by inspection of the certificate of incorporation. A copy of the rules, certified by the secretary, should also be required, to see that any provisions as to the use of the common seal have been observed (see s. 16); and inquiry should be made of the Registrar of Friendly Societies, to ascertain that the registry of the society has not been cancelled or suspended (see 57 & 58 Vict. c. 47, s. 6). It must further be remembered, that although the effect of the statutory receipt under either Act is to vest the estate in "the person for the time being entitled to the equity of redemption," this has been held to mean the person having the best right to call for it (see *Hosking* v. *Smith,* 1888, 13 App. Cas. 582). In order to determine the position of the estate, it

should accordingly be ascertained, not merely whether there was any subsequent incumbrance at the time, but also by whom the mortgage was paid off (see *Sangster* v. *Cochrane*, 1884, 28 Ch. D. 298).

Company.—In the case of a conveyance by a company, registered under the Companies Act, 1862, a copy of the memorandum and articles of association should be furnished, to show the power of disposition; and the original memorandum and articles, and the certificate of incorporation, should be inspected at the office of the Registrar of Joint-Stock Companies. It should also be seen that the conveyance is executed in accordance with the articles, though it is unnecessary to require the minutes of the resolution authorising its execution to be produced (see *County of Gloucester Bank* v. *Rudry Merthyr, etc., Co.*, [1895] 1 Ch. 629).

Compounding Debtor.—If the grantor appears to have been a debtor, whose creditors had accepted a composition under one of the Bankruptcy Acts, the resolution for composition should be abstracted and an office copy produced, and it should be ascertained by search at the Bankruptcy Office that the grant has not been defeated by the grantor's bankruptcy, and that any recorded act of bankruptcy has ceased to be available for adjudication (see *In re Kearley & Clayton*, 1878, 7 Ch. D. 615). In the case of a composition under the Act of 1883, or the Act of 1890, it should also be ascertained that the debtor's estate has not been divested by the appointment of a trustee (see 46 & 47 Vict. c. 52, s. 18; 53 & 54 Vict. c. 71, s. 3).

Devisee.—Where the grantor is a devisee, the written assent or concurrence of the executor should be required in cases within the Land Transfer Act, 1897; and in every case it should be seen that any legacies or annuities charged on the property by the will have been released (see *In re Rebbeck*, 1894, 42 W. R. 473); unless the devise is also subject to a general charge of debts, in which case it is conceived that the devisee can make a title without a release (see *Colyer* v. *Finch*, 1856, 5 H. L. C. 905; 10 E. R. 1159). Where there is no charge, the purchaser is not concerned to see to the payment of either debts or legacies (see *British Mutual Investment Co.* v. *Smart*, 1875, L. R. 10 Ch. 567; *In re Cary & Lott*, [1901] 2 Ch. 463). If the conveyance appears to have been made in pursuance of a contract for sale entered into by the testator, the executor's receipt for the purchase-money should be abstracted and produced (see *In re Manchester and Southport Ry. Co.*, 1854, 19 Beav. 365; 52 E. R. 391). In the case of a disposition by the devisee of mortgage estates, it should be considered whether the devise is defeated by sec. 30 of the Conveyancing Act, 1881, and the receipt for the consideration should be seen to be signed by the executor, whether the instrument be a reconveyance, transfer, or conveyance under the mortgagee's power of sale.

Executor.—Where leaseholds are assigned by an executor, the probate should be produced as evidence of his title; and if the will contains any specific bequest of the property, the concurrence of the legatee should be shown, or a written acknowledgment obtained from him that the bequest had not been assented to. So where freeholds are conveyed by an executor under the powers of the Land Transfer Act, 1897, production of the probate and the concurrence of the devisee, or his written acknowledgment of the devise not having been assented to, should be required, and if there are several executors, all should be required to join unless the Court authorises the sale (see 60 & 61 Vict. c. 65, s. 2;

In re Pawley and London, etc., Bank, [1900] 1 Ch. 58). In other cases where freeholds are conveyed by an executor, it should be seen either that the estate was devised to him charged with debts (see *Corser* v. *Cartwright*, 1875, L. R. 7 H. L. 731), or that he had power to sell by virtue of a direction in the will (see *Hamilton* v. *Buckmaster*, 1866, L. R. 3 Eq. 323), or under some statute. A charge of legacies is not sufficient, except in cases within 22 & 23 Vict. c. 35, s. 16 (see *In re Rebbeck*, 1894, 42 W. R. 473).

Heir.—Where a conveyance is made by an heir, the concurrence of the administrator should be required in cases within the Land Transfer Act, 1897; and in every case letters of administration to the ancestor's estate should be produced, and evidence of the intestacy furnished; and search should be made to see that no will has been proved. It must also be observed, whether the ancestor took by descent, or whether he was the last purchaser; and the rules of descent laid down by the Inheritance Act, 1833, must be borne in mind. It must be seen that the alleged heir survived the intestate, and that there is sufficient evidence of the relationship and of the failure of nearer heirs. If the property is situate in Kent, the custom of gavelkind must be remembered; and, in the case of copyhold property, the custom of the manor must be ascertained from the steward; and it must be considered whether the devolution is affected by the Land Transfer Act, 1897 (see *In re Somerville & Turner*, [1903] 2 Ch. 583). It should also be seen that the widow's dower or free bench and her rights (if any) under the Intestates' Estates Act, 1890, have been released; or, if the intestate was a married woman, that any right of the husband to curtesy has been discharged.

Legatee.—Where leaseholds are assigned by a legatee, the executor's written assent to the bequest should be shown, unless he joined in the assignment. If the assignment is made by a residuary legatee, all legacies and annuities given by the will should also be shown to have been paid or duly appropriated (see *In re Owthwaite*, [1891] 3 Ch. 494); but the purchaser is not concerned to inquire whether the testator's debts have been paid, as they are not a charge on the assets (see *British Mutual Investment Co.* v. *Smart*, 1875, L. R. 10 Ch. 567).

Life Tenant.—Where a life tenant purports to grant the fee-simple, it must be seen that the conveyance is dated since the Settled Land Act, 1882, came into operation, and it must be ascertained that there were trustees of the settlement for the purposes of the Act, and that the purchase-money was paid either to them or into Court at the request of the life tenant (see 45 & 46 Vict. c. 38, s. 22); and if the property conveyed was the principal mansion-house, the written consent of the trustees, or an order of the Court authorising the sale, should be abstracted and produced (see 45 & 46 Vict. c. 38, s. 15; 53 & 54 Vict. c. 69, s. 10). The concurrence of any persons having estates, interests, or charges, in priority to the settlement, or securing money actually raised, should be shown (see 45 & 46 Vict. c. 38, s. 20); and also, if the life tenant has mortgaged or assigned his estate, the concurrence of the mortgagee or assignee (s. 50); unless the assignment was in consideration of marriage or by way of family arrangement (53 & 54 Vict. c. 69, s. 4). If the land is settled by way of trust for sale, the order of the Court giving the life tenant leave to sell should be abstracted and produced (see 47 & 48 Vict. c. 18, s. 7).

Liquidation Trustees.—In the case of a conveyance by the trustee of a liquidating debtor, the resolutions for liquidation and appointment of a trustee should be abstracted and an office copy produced. An office copy of the certificate of the trustee's appointment should also be produced, as his appointment only takes effect from the date of the certificate (see 32 & 33 Vict. c. 71, ss. 18, 125).

Liquidator.—Where a conveyance is made on a sale by the liquidator of a company registered under the Companies Act, 1862, it must be seen that the conveyance is made in the name of the company, and is under its common seal. If made in a compulsory winding-up, the winding-up order and the order appointing the liquidator should be abstracted and produced, and if the winding-up order was prior to the Companies (Winding-up) Act, 1890, the order authorising the sale should be abstracted and produced (see 25 & 26 Vict. c. 89, s. 95; 53 & 54 Vict. c. 63, ss. 12, 31). If the winding-up order is made by a County Court, the jurisdiction should be shown (see *In re Bowling and Welby*, [1895] 1 Ch. 663). If the conveyance is made in a voluntary winding-up, the resolution for winding-up should be abstracted, and evidence given of its having been passed in accordance with the articles (see 25 & 26 Vict. c. 89, s. 129; *In re Sheffield, etc., Co.*, W. N. 1887, 218). If the conveyance is made in a winding-up under supervision, the same points require attention as in the case of a voluntary winding-up; the supervision order and any order appointing additional liquidators should also be abstracted and produced, and any restrictions imposed by the Court should be seen to have been observed (see 25 & 26 Vict. c. 89, ss. 150, 151).

Lunatic's Committee.—In the case of a conveyance on a sale by the committee of a lunatic, the order of the Court of Lunacy authorising the sale should be abstracted, and an office copy produced; and it should be seen that the committee executed the conveyance in the name and on behalf of the lunatic (see 53 Vict. c. 5, ss. 120, 124).

Married Woman.—A conveyance by a married woman of freeholds, other than separate estate, should be ascertained to have been executed by her husband and duly acknowledged by her, unless the Married Women's Property Act, 1882, applies. The same formalities should be ascertained to have been observed on a conveyance of separate estate, unless the legal estate was outstanding in trustees, in which case it is sufficient to see that they joined in the conveyance (see *Taylor* v. *Meads*, 1865, 4 De G., J. & S. 597; 46 E. R. 1050). But in every case it should be ascertained that there was no restraint on anticipation (see *Stanley* v. *Stanley*, 1878, 7 Ch. D. 589). It must be remembered that acknowledgment and the husband's concurrence are equally necessary in respect of estates vested in a married woman as trustee, even since the Act of 1882 (see *In re Harkness and Allsopp*, [1896] 2 Ch. 358); unless she was merely a bare trustee, and the case falls within sec. 6 of the Vendor and Purchaser Act, 1874, or sec. 16 of the Trustee Act, 1893 (see *In re Howgate & Osborn*, [1902] 1 Ch. 451). A married woman's mortgage estates stand on the same footing, except where the Act of 1882 applies (see *In re Brooke & Fremlin*, [1898] 1 Ch. 647; and see *In re West & Hardy*, [1904] 1 Ch. 145). An office copy of the certificate of acknowledgment should be produced as the only sufficient evidence of the acknowledgment (see *Jolly* v. *Handcock*, 1852, 7 Ex. Rep. 820); except in cases within the Conveyancing Act, 1882, which makes the indorsed memorandum of acknowledgment sufficient (s. 7). In the case of an

assignment of a married woman's leaseholds, not within the Married Women's Property Act, 1882, it should be seen that the husband was a conveying party, and if her estate was merely equitable, or could not fall into possession during the coverture, it should be seen that the assignment was duly acknowledged, unless the property was separate estate. See ACKNOWLEDGMENT OF DEEDS.

Mortgagee.—Where a conveyance appears to have been made by a mortgagee selling under his power of sale, it should be seen that the mortgage money had become due, and also that such default had been made in payment of principal or interest as to render the power exercisable, and that any notice required by the power had been given, unless the mortgage deed contains a clause protecting the purchaser (see *Dicker* v. *Angerstein*, 1876, 3 Ch. D. 600), or such a clause is implied by statute (see Conveyancing Act, 1881, s. 21); bearing in mind that a clause of this kind is no protection against a known irregularity (see *Selwyn* v. *Garfit*, 1888, 38 Ch. D. 273). If the conveyance is made by the survivor of several mortgagees, it must be seen that the mortgage contained a proper joint account clause, or power for the survivor to give receipts, unless the case falls within sec. 61 of the Conveyancing Act, 1881. If the mortgagee purports to convey as absolute owner after a foreclosure order, it should be seen that all the persons interested in the equity of redemption were parties to, or duly represented in, the action.

Next-of-Kin.—In the case of an assignment of leaseholds by the next-of-kin of an intestate, it should be seen that the administrator joined to convey the legal estate, as his mere assent is not sufficient to pass it (see Burton's *Compendium*, 311); and it should be seen that the widow (if any) joined to release her rights.

Railway Company.—In the case of a conveyance by a railway company, it should be shown that the company had power to sell, which depends on the land having been acquired for extraordinary purposes under sec. 13 of the Lands Clauses Consolidation Act, 1845, or having become superfluous under sec. 127; and, in the latter case, it should be ascertained that the rights of pre-emption of all original and adjoining owners under sec. 128 have ceased (see *South-Western Railway Co.* v. *Blackmore*, 1870, L. R. 4 H. L. 610). It should also be seen that the conveyance is under the company's common seal (see s. 131).

Tenant in Tail.—A conveyance by a tenant in tail must be seen to pass the estate, and not merely declare a trust (see *Green* v. *Paterson*, 1886, 32 Ch. D. 95), and must be ascertained to have been enrolled in Chancery within six months after execution (see 3 & 4 Will. IV. c. 74, s. 41), unless effectuating a sale under the powers of the Settled Land Act, 1882, in which case it stands on the same footing as the conveyance of a life tenant under the same Act (45 & 46 Vict. c. 38, s. 58). If there is a prior life estate under the same settlement, it should be seen that the protector gave his consent either by the disentailing deed, or by a previous or contemporaneous deed, enrolled either previously or at the same time (see 3 & 4 Will. IV. c. 74, ss. 42, 46). If the tenant in tail was a married woman, it should be seen that the husband concurred, and that the deed was duly acknowledged (see *Cooper* v. *Macdonald*, 1877, 7 Ch. D. 295), unless the Married Women's Property Act, 1882, applies (see *In re Drummond and Davie*, [1891] 1 Ch. 524).

Trustees.—In the case of a conveyance by trustees, it must be ascertained that the time and mode of sale are authorised by the trust

(see *In re Bryant and Barningham*, 1890, 44 Ch. D. 218), and that any person whose consent was required joined in the conveyance. It must be remembered that if the sale is in exercise of a power, the consent of the person entitled to the rents is necessary, in cases within sec. 10 of 23 & 24 Vict. c. 145; and where the conveyance is after the Settled Land Act, 1882, came into operation, the concurrence of the life tenant is required (45 & 46 Vict. c. 38, s. 56); and if he has assigned his interest or become bankrupt, the consent of his assignee or trustee in bankruptcy should also be shown (see *In re Bedingfield and Herring*, [1893] 2 Ch. 332). It should be seen that the trust instrument contains an express power to give receipts or direction for payment to the trustees, unless there is a trust for payment of debts, or a statutory power to give receipts exists (see 22 & 23 Vict. c. 35, s. 23; Trustee Act, 1893, s. 20). It should also be seen that the power of sale has not come to an end (see *In re Sudeley and Baines*, [1894] 1 Ch. 334). If trustees of a partial interest have joined with the other owners in selling, it should be seen that the purchase-money was apportioned, and that they received their proper share (see *In re Cooper and Allen*, 1876, 4 Ch. D. 802).

In considering the effect of a will, every clause from beginning to end must be carefully read, bearing in mind the rules of construction laid down by the Wills Act, 1837, and the alteration in the law effected by the Land Transfer Act, 1897, in vesting freeholds in the executor. It must be ascertained whether the property is comprised in any specific devise, or whether it passes under a residuary gift, and whether the devisee's interest has lapsed by his predeceasing the testator; and here the special provisions as to devises in tail and gifts to children and issue (1 Vict. c. 26, ss. 32, 33), and the effect of a gift to a class (see *In re Harvey*, [1893] 1 Ch. 567) must not be forgotten.

In the case of a married woman's will, it must be shown either that she had a power of appointment over the property, or that it was her separate estate; and in the latter case it must be seen that the legal estate is got in from the heir, or the trustee in whom it was vested (see *Hall* v. *Waterhouse*, 1865, 6 N. R. 20); unless the Married Women's Property Act, 1882, applies. It must also be borne in mind, if she survived her husband, that property acquired after his death does not pass (*In re Price*, 1885, 28 Ch. D. 709), unless the will has been re-executed since his death, or the case falls within the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

In the case of the will of a mortgagee dying before the Conveyancing Act, 1881, came into operation, it must be observed whether there is a devise of mortgage estates, and if not, whether there is any general devise wide enough to pass them (see *In re Packman and Moss*, 1875, 1 Ch. D. 214). So, if the title is traced through the will of a trustee, in cases not within sec. 5 of the Vendor and Purchaser Act, 1874, or sec. 30 of the Conveyancing Act, 1881, it must be observed whether there is a devise of trust estates, and if not, whether they pass by a general devise (see *In re Bellis*, 1877, 5 Ch. D. 504).

The whole will must be searched to see that the devise is not rendered defeasible by a gift over; and the validity of any contingent limitations or executory devises must be considered (bearing in mind the rule against perpetuities and the alterations in the law effected by the Contingent Remainders Act, 1877, and sec. 10 of the Conveyancing

Act, 1882). It must be noticed whether any legacies or annuities are charged on the property, and whether there is a charge of debts, and also whether the devisee is made a trustee, with or without power of sale.

In the case of a beneficial devise, it should be seen that the attesting witnesses do not include the devisee, or the husband or wife of the devisee (see 1 Vict. c. 26, s. 15). If the property is freehold, situate in Middlesex or Yorkshire, and the testator died before the Land Transfer Act, 1897, came into operation, it should be ascertained whether the will was registered within six months after the testator's death, and if not, whether the defect is cured by sec. 8 of the Vendor and Purchaser Act, 1874. But if the testator died after the Land Transfer Act, 1897, came into operation, or if the property is leasehold, the fact of the will not being registered seems to be of no importance, as the title must be traced through the executor (see Sugden, *Vendors and Purchasers*, 546). If probate has not been obtained of a will of freeholds, by reason of its not comprising any personal estate, the original will must be ascertained to be duly signed by the testator and attested by two witnesses, in accordance with the Wills Act, 1837; and the death of the testator must be proved, and search made to see that no other will has been proved. But if the death took place after the Land Transfer Act, 1897, came into operation, or if the property consists of leaseholds, probate of the will should be required, as it is part of the evidence of title.

In the case of copyholds, the title should commence with a surrender and admittance forty years old (see Dart, *Vendors and Purchasers*, 333); and, in considering the effect of all subsequent surrenders and admittances, it must be remembered that the legal estate only passes by admittance (Scriven, *Copyholds*, 7th ed., 122), and also that any departure in an admittance from the uses of the surrender is void (Scriven, *Copyholds*, 102). There is usually more difficulty in identifying the property than in the case of freeholds, as old descriptions are commonly retained on the Court rolls long after they have ceased to be applicable; hence a statutory declaration of enjoyment, according to the title shown, is in most cases necessary. The copies of Court roll should be ascertained to be signed by the steward, and all surrenders should be seen to be duly stamped.

A surrender by a married woman should be ascertained to have been made upon her separate examination, and with the concurrence of her husband, in all cases not within the Married Women's Property Act, 1882; or if her interest was merely equitable and conveyed by deed, it should be seen to have been executed by the husband and duly acknowledged, except in the case of separate estate.

A surrender or deed, by which an estate tail is barred, should be seen to be entered on the Court rolls within six months after execution (see *Green* v. *Paterson*, 1886, 32 Ch. D. 95); and if there is a protector, his consent should be seen to have been entered at the same time or previously (see 3 & 4 Will. IV. c. 74, ss. 50-54).

If any lease for more than a year has been granted, the licence of the lord of the manor should be shown, as otherwise it would be a cause of forfeiture of the copyholder's interest (see Scriven, *Copyholds*, 209).

In this way the person perusing the abstract must proceed, questioning everything and taking nothing for granted, to ascertain whether each instrument accomplishes its professed object. See

Requisitions on Title. Every defect discovered must be considered, to see whether it has been cured by time or subsequent disposition, or whether it constitutes a subsisting objection to the title. A purchaser is not bound to be suspicious (see *Bailey* v. *Barnes*, [1894] 1 Ch. 25); but if any instrument appears to be of doubtful validity, inquiry should be made into the circumstances of the case. Breaches of trust disclosed by the abstract, charges, and outstanding estates, must all be noted, and requisitions made for clearing the title, so far as not precluded by the contract. In this connection, it is to be observed that a condition which does not fairly state the facts or the defect, is not binding in equity (see *St. Saviour's Rectory Trustees and Oyler*, 1886, 31 Ch. D. 412).

If the property is sold as freehold, or if nothing is said about the tenure, it must be seen that a title is shown to the freehold, and not merely to a copyhold or leasehold interest (*Hart* v. *Swaine*, 1877, 7 Ch. D. 42). So, where a title depends on a term having been enlarged into a fee-simple, the case must be ascertained to be within sec. 65 of the Conveyancing Act, 1881, and sec. 11 of the Conveyancing Act, 1882. On the purchase of ground rents, the length of the term as well as the amount of rent reserved by each lease must be seen to agree with the contract, as any material discrepancy would be a ground for compensation. So, if leaseholds are purchased, it should be ascertained that the lease under which the property is held is correctly stated in the contract, both as to the term and rent, as a mis-statement would entitle the purchaser to compensation, or in some cases even to rescission of the contract (see *Jones* v. *Rimmer*, 1880, 14 Ch. D. 588). So, if the vendor contracts to sell the property subject to an apportioned rent, it should be seen that the apportionment has been properly made. The lease under which the property is held, should also be ascertained not to contain any clause empowering the lessor to determine it before the end of the term (see *Weston* v. *Savage*, 1879, 10 Ch. D. 736); if it contains a proviso for re-entry for breach of covenant, it should be ascertained not to comprise other property (see *Creswell* v. *Davidson*, 1887, 56 L. T. 811); and if the property has been sublet, the underlease should be shown to contain similar covenants to those in the superior lease (see *Darlington* v. *Hamilton*, 1854, Kay, 550).

The devolution of both legal estate and beneficial interest must be carefully traced, and as neither confers a marketable title without the other, it must be seen that the vendor either has or can procure the conveyance of both; and in the case of registered land, if the vendor is not the registered proprietor he should be required to register before completion or to procure a transfer from the registered proprietor (see 60 & 61 Vict. c. 65, s. 16). All contingencies on which the title depends should be ascertained to have happened, and the title shown not to be defeasible by any event or by the act of any person. Thus, if the title depends on the vendor surviving A., A.'s death should be proved; if an option of purchase or overriding power of appointment is vested in B., it should be released; while, if the title depends on a doubtful question of fact or law, or on the construction of an ambiguous will, all the parties taking in any event should join in the conveyance.

Any restriction as to user or alienation must be observed, as, unless the sale is made subject thereto, it might be a fatal objection; as, where a disused burial-ground is sold for building purposes (see *In re Ponsford and Newport District School Board*, [1894] 1 Ch. 454); or where lease-

holds are subject to a covenant against assignment without licence (see *Bishop* v. *Taylor*, 1891, 39 W. R. 542).

All estates prior to the vendor's should be shown to have determined, unless the persons in whom they are vested are to join in the conveyance; thus the death of life tenants, tenants by the curtesy, and annuitants, should be proved by production of certificates of death, while in the case of a prior estate tail, the death of the tenant in tail and failure of his issue should be proved, and a search for disentailing deeds made. Dower is now seldom an incumbrance, except where a prior owner has died intestate, but in that case its release should be procured. Any subsisting mortgage should be required to be released by the mortgagee, and in the case of registered land, the proprietor of any registered charge should be required to join in the transfer and to deliver up his certificate of charge to the registrar to be cancelled (see 60 & 61 Vict. c. 65, s. 8); and where the contract does not mention any tenancy, a lease must be treated as an incumbrance (see *Caballero* v. *Henty*, 1874, L. R. 9 Ch. 447).

If any owner in fee, life tenant, or annuitant has died within twelve years preceding the sale, evidence should be given of the discharge of all succession duty payable on his death; but any succession before that period may be disregarded, in reliance on sec. 12 of 52 Vict. c. 7. So, evidence of payment of any temporary estate duty, payable under the Inland Revenue Act, 1889, or of any estate duty and settlement estate duty, payable under the Finance Act, 1894, should be furnished. In the case of leaseholds, all succession duty should be shown to be discharged; but, except where freedom from succession duty is dependent thereon, no inquiry need be made as to whether the right amount of probate or estate duty has been paid (see *In re Culverhouse*, [1896] 2 Ch. 251). As to settlement estate duty, however, see 59 & 60 Vict. c. 28, s. 19.

Inquiry should be made of the vestry or local authority as to the existence of any statutory charge for paving or sewering expenses or private street works; and if the work is complete at the date of the contract or before the time fixed for completion, the vendor should be required to discharge it (see *In re Bettesworth and Richer*, 1888, 37 Ch. D. 535; *Stock* v. *Meakin*, [1900] 1 Ch. 683; *In re Allen & Driscoll*, [1904] 2 Ch. 226).

Inquiry should in general be made whether the vendor has executed any settlement, as, although no answer may be received beyond a reference to *In re Ford and Hill*, 1879, 10 Ch. D. 365, the inquiry calls attention to the point, and throws the responsibility of any suppression on the vendor's solicitor, if he does not trouble to ascertain whether such an instrument exists. Where the vendor is a mortgagor, selling an equity of redemption, inquiry should be made of the mortgagee as to the amount owing on his security, at the same time informing him of the intended purchase. Occupying tenants should be interrogated as to the nature of their holding, and the person to whom they pay rent (see *Holmes* v. *Powell*, 1856, 8 De G., M. & G. 572; 44 E. R. 510); and if they are found to pay rent to a stranger, inquiry should be made of him as to his interest, notwithstanding the decision in *Hunt* v. *Luck*, [1902] 1 Ch. 428.

The old searches for judgments, Crown debts and executions are rendered unnecessary by the Act 63 & 64 Vict. c. 26, s. 2; but searches

should be made against the vendor for writs and orders, *lis pendens*, annuities and rent charges, deeds of arrangement and land charges, and for bankruptcy, liquidation, and composition proceedings, unless he is merely a trustee or mortgagee, in which case a search for *lis pendens* seems to be in general sufficient. See SEARCHES. If the property is freehold or leasehold, and is situate in Middlesex or Yorkshire, the local registry should be searched (except in the case of registered land), see REGISTRATION OF DEEDS; and, in the case of copyholds, a search should be made in the Court rolls, to see that no instruments are omitted from the abstract. All these searches should in general be carried back to the last purchase for value.

The public index map of registered land and list of pending applications for registration should be searched at the Land Registry to see if they include the property.

Production of the abstracted deeds and documents, including, in the case of registered land, the land certificate, should in all cases be required for the purpose of ascertaining that they are correctly abstracted, and have not been handed to a mortgagee or lost. If the recent title-deeds are lost, the title cannot be considered as marketable; but the mere fact of some of the earlier title-deeds having been lost is no objection, if from their age or nature their absence does not render the title doubtful (see Sugden, *Vendors and Purchasers*, 437). A title may be good without any deeds, as where the vendor holds under a succession of wills (see *Bulley* v. *Bulley*, 1874, L. R. 9 Ch. 747); but great caution is necessary to make sure that no deeds exist, and that their absence is not due to their having been deposited as a security.

[See Preston, *Abstracts of Title*, 2nd ed., 1823; Atkinson, *Marketable Titles*, 1833; Gardenor, *Directions for Drawing Abstracts of Title*, 2nd ed., 1847; Moore, *Instructions for Preparing Abstracts of Title*, 4th ed., 1886; Comyns, *Exercises on Abstracts of Title*, 5th ed., 1895; Bythewood and Jarman, *Precedents in Conveyancing*, 4th ed., 1884, vol. i.; Sugden, *Vendors and Purchasers*, 14th ed., 1862, ch. x. to xii.; Dart, *Vendors and Purchasers*, 7th ed., 1905, ch. viii.; Prideaux, *Precedents in Conveyancing*, 19th ed., 1904, vol. i.; Clerke and Humphry, *Sales of Land*, 1885, ch. viii.; Emmet, *Notes on Perusing Titles*, 5th ed., 1903; Dickins, *Requisitions on Title*, 2nd ed., 1898; *Encyclopædia of Forms and Precedents*, 1902, vol. i.; Jackson and Gosset, *Investigation of Title*, 2nd ed., 1899; Gover, *Advising on Title*, 4th ed., 1905.]

PRECEDENTS.

NOTE.—*Arrangement of Margins.* In preparing Abstracts the following is the order which is generally adopted with regard to the arrangement of clauses of documents, &c., in the several margins:—

1*st Margin.* The dates of events and of documents abstracted.

2*nd Margin.* Names and descriptions of parties, witnessing parts, powers, provisoes, agreements, covenants, conditions, headings relating to different parts of a property, acts of parliament, decrees and orders of the courts, reports and certificates of masters, chief clerks, &c., certificates generally, statements of fact, and all other matters not assigned to the inner margins.

3*rd Margin.* The recitals, habendums.

4th Margin. Uses, trusts.

5th Margin. Parcels, estate clauses, general words, exceptions and reservations, execution and attestation of documents, probates of wills.

Many practitioners, however, put covenants in the 4th margin (if long), or in a 6th margin (if short), and general words also in the 6th margin. (Moore on Abstracts, p. 78.)

I. *ABSTRACT OF THE TITLE of* JOHN WHITE, ROBERT SMITH, *and* THOMAS BROWN (*Mortgagees selling under their Statutory powers of Sale*),[1] *to certain Freehold Messuages and Hereditaments in the Parish of Thorpe, in the North Riding of Yorkshire.*

Dec. 8 & 9, 1840. INDENTURES OF LEASE AND RELEASE, by way of mortgage, BETWEEN William Watts, of the one part, and John Murray, of the other part.

IT WAS WITNESSED, in consideration of £1,000 to said William Watts, paid by said John Murray, said William Watts did grant, bargain, sell, remise, and confirm, unto said John Murray, his heirs and assigns (inter alia),

ALL that messuage or tenement, with the yard, orchard, barn, and other appurtenances unto the same belonging, commonly called Drake's, in the parish of Thorpe, in the North Riding of the county of York, in a street there, called Jock's End, between the King's highway or street there on the west part thereof; the messuage thereinafter mentioned and a land sometimes called Smith's way, on the north part thereof; a field called Scott's field, on the east part; and an inn, called the Cavalier, on the south part thereof; and then in the tenure or occupation of Thomas Wood, his under-tenants, or assigns:

AND ALSO ALL that other messuage, cottage, or tenement, situate, standing, and being in Thorpe aforesaid, in the said street called Jock's End, and adjoining to the aforesaid messuage or tenement, and commonly called or known by the name or sign of the Old Plough, being then in the tenure or occupation of Mary Edwards and John Metcalf, or one of them, their, or one of their assigns, or under-tenants:

AND ALSO ALL and singular other the freehold messuages, cottages, lands, tenements, hereditaments, and premises whatsoever of him said William Watts, situate, lying, and being in Thorpe aforesaid;

AND all and singular cellars, sollars, &c.;

AND the reversion, &c.;

AND all the estate, &c.:

TO HOLD the same unto the said John Murray and his heirs:

TO THE USE of the said John Murray, his heirs and assigns, for ever.

[1] See Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), sects. 19, 20, 21 and 22.

Dec. 8 & 9, 1840. PROVISO for making void the now abstracting indenture, on payment, by said William Watts, of £1,000, with lawful interest, on the 8th June, then next.

COVENANT for payment of said £1,000 with interest.

COVENANT by said William Watts, that he had right to convey;

FREE from incumbrances;

THAT he was well seised;

FOR quiet enjoyment by mortgagee after default;

FREE from incumbrances;

FOR further assurance after default;

PROVISO for mortgagor's quiet enjoyment until default;

COVENANT for insuring, and assigning policy of insurance.

EXECUTED by all parties, attested, and RECEIPT for consideration indorsed.

REGISTERED at Northallerton, 27th February, 1841. B. 2, No. 419.

Sept. 8, 1844. INDENTURE OF RELEASE, made in pursuance of the Act passed in the 4th and 5th years of the reign of her Majesty Queen Victoria, and intituled "An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties," BETWEEN said John Murray, of the first part; said William Watts, of the second part; and Henry Green, of the third part.

RECITING the hereinbefore abstracted indentures of the 8th and 9th December, 1840.

RECITING that the said principal sum of £1,000, secured by the said therein in part recited indentures, remained due to the said John Murray, together with £37, 10s. 0d., interest to the day of the date thereof.

IT WAS WITNESSED, that in consideration of the sum of £1,037, 10s. 0d. to said John Murray, by direction of said William Watts, paid by said Henry Green in discharge of principal and interest due, and in consideration of the further sum of £722, 10s. 0d. to said William Watts, paid by said Henry Green, said John Murray did bargain, sell, release, and for ever quit claim, and said William Watts did grant, ratify, release, and confirm unto said Henry Green, his heirs and assigns,

ALL [the before abstracted premises];

AND all and singular cellars, sollars, &c.;

AND ALSO all and singular the freehold messuages, &c., of him, said William Watts, situate in the said parish of Thorpe;

AND the reversion, &c.;

AND all the estate, &c.:

TO HOLD the same unto said Henry Green, his heirs and assigns;

TO THE ONLY PROPER USE and behoof of said Henry Green, his heirs and assigns, for ever.

COVENANT by said John Murray that he had done no act to incumber.

Sept. 8, 1844. COVENANT by said William Watts that he was well seised (subject only to the before abstracted indentures of mortgage):

THAT he or said John Murray had right to convey, and for further assurance.

EXECUTED by all parties, and attested, and RECEIPT for consideration indorsed.

REGISTERED at Northallerton, 17th September, 1844.

July 3, 1854. THE SAID HENRY GREEN, by his WILL, of this date, gave and devised his freehold messuages, lands, tenements, and hereditaments whatsoever, with appurtenances, situate in the parish of Thorpe, aforesaid.

To John Foot, Thomas Wing, and Edward Morton, their heirs and assigns,

IN TRUST, that they, or the survivors or survivor of them, his heirs and assigns, should, as soon as might be after his decease, sell and dispose of the same by public auction.

AND for facilitating the sale thereof, he did order and direct that the receipts of the said John Foot, Thomas Wing, and Edward Morton, or either of them, should be sufficient discharges for such purchase-money: And the said testator did give, devise, and bequeath the rents and profits of the said premises, and the purchase-money thereof, when sold, unto the several persons in his said will named, in manner therein mentioned: And the said testator appointed the said John Foot, Thomas Wing, and Edward Morton executors.

EXECUTED by said testator, and attested by Thomas Reid and Benjamin Ward.[1]

PROVED, 15th January, 1861, in the Principal Registry of the Court of Probate.

REGISTERED at Northallerton, 30th Jan. 1861. B. 2, No. 176.

Nov. 6, 1860. THE SAID HENRY GREEN died.

Feb. 6, 1861. INDENTURE BETWEEN said John Foot, Thomas Wing, and Edward Morton, of the one part, and James Stone, of the other part.

RECITING the before abstracted will of said Henry Green;

RECITING sale by public auction:

IT WAS WITNESSED, that, in performance of the trusts thereinbefore recited, and in consideration of £2,000 paid to said Foot, Wing, and Morton, by said James Stone, said Foot, Wing, and Morton, did grant, bargain, sell, alien, release, and confirm unto said James Stone (in his actual possession, &c.), to his heirs,

ALL [the before abstracted premises];

TO HOLD the same unto said James Stone, his heirs and assigns:

TO THE USE of said James Stone, his heirs and assigns, for ever.

[1] The names of the witnesses to a will should always be stated, that it may be seen that no devise or bequest has been invalidated by the making the devisee or legatee a witness.

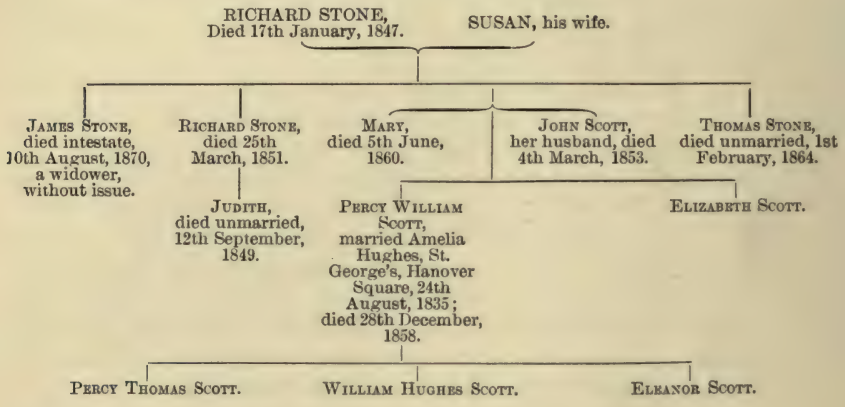
Feb. 6, 1861. COVENANT by said Foot, Wing, and Morton, that they had done no act to incumber,

AND for further assurance.

EXECUTED by said Foot, Wing, and Morton, and attested, and RECEIPT for consideration indorsed.

REGISTERED at Northallerton, 8th March, 1861. B. 2, No. 177.

Aug. 10, 1870. THE said James Stone died intestate, and without issue, whereupon the estate descended to PERCY THOMAS SCOTT, his heir at law, as appears by the following sketch of his pedigree:—



May 2, 1882. DECLARATION of ELIZABETH WATERS as follows:—"I, Elizabeth Waters, of the parish of Sudworth, in the county of Northampton, widow, do solemnly declare, that I well knew Richard Stone and Susan his wife, who many years since resided at Oldford Grange, which is in the parish of Cayfield, in the said county of Northampton, That the said Richard Stone died, and was buried at Cayfield aforesaid, in or about the year 1847, leaving the said Susan his wife widow, and four children him surviving, namely, James Stone, Richard Stone, Mary the wife of John Scott, and Thomas Stone. And I further declare, that I well knew the said James Stone, and that he married Anna Gilbert, at York, in the year 1842, and that she died shortly after the said marriage without issue, and that the said James Stone never married again, but died in the year 1870 without issue. And I further declare, that the said Richard Stone the younger had a daughter named Judith (who was his only child), and who died in his lifetime, namely, about the year 1849, unmarried. And I further declare, that I have been informed, and verily believe, that the said Mary Stone married one John Scott, and that they had one son, named Percy William Scott, and that he was drowned in the River Cam, in or about the year 1853, leaving lawful issue, namely, a son, named Percy Thomas Scott, and one younger son, and one daughter; And I verily believe that the said Percy Thomas Scott is the grand-nephew and heir at law of the said James Stone, and I make this

May 2, 1882. declaration, &c. (Signed) E. Waters. Declared at Cayfield, in the county of Northampton, this 2nd day of May, 1882, before me, John Brown, a Commissioner to administer Oaths."

May 19, 1882. INDENTURE made by way of statutory mortgage, BETWEEN Percy Thomas Scott, of the one part, and John White, Robert Smith, and Thomas Brown, of the other part.

IT WAS WITNESSED, that in consideration of the sum of £2,500, paid to said Percy Thomas Scott by said John White, Robert Smith, and Thomas Brown, out of money belonging to them on a joint account (of which sum of £2,500 said Percy Thomas Scott thereby acknowledged the receipt), said Percy Thomas Scott, as mortgagor and beneficial owner, conveyed unto said John White, Robert Smith, and Thomas Brown (inter alia),

ALL [the before abstracted premises];

TO HOLD the same to and to the use of said John White, Robert Smith, and Thomas Brown, in fee simple.

FOR SECURING payment, on the 19th day of November, 1882, of the principal sum of £2,500, with interest thereon, at the rate of £4 per centum per annum.

PROVISO that said Percy Thomas Scott, or any person deriving title under him, should not, except with the consent in writing of said John White, Robert Smith, and Thomas Brown, or the persons or person deriving title under them, exercise the powers of leasing or of agreeing to lease conferred by the Conveyancing and Law of Property Act, 1881, on a mortgagee while in possession.

II. *ABSTRACT OF THE TITLE of* Mr. GEORGE JONES *to certain Lands and Tenements at Stoke, in the County of Norfolk, and Copyhold of the said Manor.*

Oct. 1, 1850. BENJAMIN SMITH, of Stoke, in the county of Norfolk, Yeoman, a copyhold tenant of the said manor, personally went before the deputy steward of Samuel Evans, gentleman, steward of the said manor and of the courts thereof, and in consideration of the sum of £1,000 to him the said Benjamin Smith, then paid, advanced, and lent by James Marsh, of Cromer, in the said county, farmer, by way of mortgage (the receipt whereof was thereby acknowledged), did out of court surrender by the rod

ALL THAT one messuage or tenement, with a yard thereto adjoining and belonging, at Stoke. And also one piece of land, with a tenement thereupon built, lying between a way called Parson's Lane towards the south, and the lands then late of Andrew Clark towards the north, one head abutted on lands of the lord of the said manor towards the west, and upon New Street towards the east, and it contained by estima-

Oct. 1, 1850. tion 9 acres 1 rood and 15 perches, as appeareth by the survey book of the manor under the figure 1.

AND also all that piece of land described in the award of the commissioners acting under the Stoke Inclosure Act by the No. 8, containing by measure 16 acres and 2 roods, bounded by land No. 7 east, No. 2 north, No. 9 west, and the drift way A, south;

AND the revocation, &c.;

AND all the estate:

TO THE ONLY USE AND BEHOOF of the said James Marsh, his heirs and assigns;

UPON CONDITION to be void upon payment to said James Marsh, his executors, administrators, and assigns, of the sum of £1,000 on the day of with interest thereon at the rate of £ per cent.

Oct. 1, 1850. BY INDENTURE so dated, made between said Benjamin Smith, of the one part, and said James Marsh, of the other part:

RECITING that said Benjamin Smith was seised of the said hereditaments before described;

AND RECITING that upon the application and request of said Benjamin Smith said James Marsh had agreed to advance him, and had advanced him, the sum of £1,000, upon having the repayment, with interest at £5 per cent., secured to him by a surrender of the said hereditaments, and by the covenant of said Benjamin Smith, thereinafter contained.

AND RECITING the conditional surrender before abstracted.

IT WAS WITNESSED that in pursuance and further performance of the said recited agreement, and for the purpose of more effectually securing the repayment thereof, he, the said Benjamin Smith, for himself, his heirs, executors, and administrators did thereby covenant,

THAT he had good right to surrender:

FOR quiet enjoyment after default:

FREE from incumbrances:

TO insure against fire:

FOR further assurance:

Executed by the said Benjamin Smith, and attested:

Receipt for £1,000 endorsed, signed and witnessed.

Oct. 3, 1860. The said BENJAMIN SMITH by his will gave, devised, and bequeathed unto his son John Smith,

ALL and every his messuages, tenements, lands, hereditaments and real estate whatsoever and wheresoever of or to which he then was, or at the time of his decease should or might be, seised or possessed or entitled, whether in possession, reversion, remainder or expectancy, or otherwise howsoever;

TO HOLD the same and every part thereof unto and to the use

Oct. 3, 1860. of his said son, his heirs, executors, administrators and assigns absolutely,

May 7, 1861. The said testator died.

Mar. 18, 1862. Will proved by the said John Smith alone in the District Registry of Her Majesty's Court of Probate at Norwich.

Aug. 22, 1869. The said James Marsh by his will appointed his sons Thomas Marsh and William Marsh executors thereof.

Mar. 3, 1871. The said James Marsh died.

May 30, 1872. Will of the said James Marsh proved (with a codicil not affecting such appointment) by the said Thomas Marsh and William Marsh in the Principal Registry of Her Majesty's Court of Probate.

Aug. 30, 1872. By STEWARD'S COPY ADMISSION it appears that the said John Smith, of Stoke, came before the steward and alleged the death of the said Benjamin Smith, and his will as before abstracted. And thereupon the said John Smith prayed to be and was admitted to the hereditaments before described.

TO HOLD to him the said John Smith and his heirs according to the form and effect of the said will of the said lord according, &c.

Nov. 13, 1873. By an acknowledgment of satisfaction under the hands of the said Thomas Marsh and William Marsh, and addressed to the chief steward of the said manor.

RECITING the surrender of the 1st October, 1850, before abstracted.

AND RECITING the death and will of the said Benjamin Smith.

AND RECITING the admission of the said John Smith on the 30th August, 1872, as before abstracted.

AND RECITING the death of the said James Marsh and his will, as before abstracted.

The said Thomas Marsh and William Marsh acknowledged to have that day received by payment of John Smith, of Stoke, the sum of £1,000, the principal money then due on the said conditional surrender, all interest having been paid by the said John Smith, and they authorize and require the said steward to enter on the court rolls of this manor full satisfaction and discharge on or for the said conditional surrender.

Nov. 13, 1873. BY INDENTURE of this date, made between the said John Smith of the one part, and George Jones of the other part.

RECITING, that the said John Smith was seised of the copyhold hereditaments thereinafter described for an estate of inheritance in possession to him and his heirs, according to

Nov. 13, 1873. the custom of the said manor, and the said John Smith had requested the said George Jones to advance him £800, which he had agreed to do on having the repayment thereof with interest secured to him in manner thereinafter expressed.

IT IS WITNESSED that in pursuance of the said agreement, and in consideration of £800 to the said John Smith then paid by the said George Jones (the receipt whereof is thereby acknowledged), he the said John Smith did thereby covenant with the said George Jones that he the said John Smith and all other necessary parties should at his own cost, and when required, surrender unto the lord or lords, lady or ladies of the said manor, according to the custom thereof.

TO THE USE of the said George Jones the premises aforesaid by the description aforesaid :

AND the reversion, &c. ;

AND all the estate :

TO HOLD the same to the said George Jones, his heirs and assigns, at the will of the lord or lords, lady or ladies of the said manor by copy of court roll, but subject to the condition then following, namely :

CONDITION to make void the now abstracting surrender on payment by the said John Smith, his heirs, executors, administrators, or assigns, to the said George Jones, his executors, administrators, or assigns, for the sum of £800, with interest at £5 per cent. per annum, on the 31st April then next.

COVENANTS by the said John Smith, for payment of the said principal sum, with interest, on the said 30th day of April ;

AND ALSO, that if default should be made in payment of the said sum of £800, and of the interest thereof, or any part thereof, and the said George Jones, his executors, administrators, or assigns should have delivered to the said John Smith, his heirs, executors, administrators, or assigns, or left at his or their last known place of abode in England, or left upon the same premises or some part thereof, a notice in writing demanding payment thereof, and two calendar months should have elapsed from the time of the delivery or leaving of such notice as aforesaid, it should be lawful for the said George Jones, his executors, administrators, or assigns (without prejudice to his or their right of foreclosing the equity of redemption of the said hereditaments, or of taking admission to the same, and without any further consent or concurrence of the said John Smith, his heirs and assigns) absolutely, to sell the said premises, and either by public auction or private contract, and subject to such conditions of sale as he should think fit, and with liberty to buy in the same or any part thereof, and to rescind any such contract, and to re-sell the same in manner aforesaid without being liable for any loss occasioned thereby, and to surrender and assure the same premises to the purchaser and purchasers thereof, and to receive and sign and give receipts for the purchase-moneys, which receipts shall discharge the persons paying the moneys therein respectively expressed to be received from all liabilities and responsibility on account thereof ; And that it should be lawful to and for

Nov. 13, 1873. the said George Jones, his executors, administrators and assigns, out of the proceeds of such sale as aforesaid, after retaining the said sum of £800 and the interest thereon, or for so much thereof respectively as shall be then due, and also all expenses incident to or incurred in relation to such sale as aforesaid, to pay the residue (if any) of the moneys aforesaid which should then remain in their hands unto the said John Smith, or other the person or persons entitled thereto;

AND ALSO, that the said John Smith had good right to surrender;

AND FURTHER, that until admission should be taken under such surrender, he the said John Smith and his heirs should stand seised and possessed of the said hereditaments, Upon trust for the said George Jones, his heirs and assigns, subject, nevertheless, to the condition for making void the surrender as aforesaid;

AND THAT it should be lawful for the said George Jones, his heirs and assigns, in case default should be made in payment of the said sum of £800, and at all times thereafter until repayment of the said principal money and interest, and every part thereof, to take admittance to the said hereditaments, and whether before or after such admittance peaceably and quietly to enter into and upon, and to have, hold and enjoy the same, and to take the rents and profits thereof to and for his and their own use and benefit, without any interruption whatsoever by the said John Smith, or his heirs or assigns, or any other person whatsoever;

AND THAT free from incumbrances (the rents, suits and services of the lord of the said manor, and the existing tenancies of the said premises only excepted);

FOR further assurance;

To keep all the buildings insured against loss or damage by fire.

AND the said John Smith did irrevocably appoint the said George Jones, his executors and administrators, his true and lawful attorney and attorneys for him and in his name and on his behalf, at any time after any sale or sales under the power of sale thereinbefore contained, to surrender

ALL and singular the said hereditaments and premises with appurtenances;

TO THE USE AND BEHOOF of the purchaser or respective purchasers thereof, his, her, or their heirs and assigns for ever, or as he, she, or they should direct, according to the custom of the said manor.

EXECUTED by both parties, duly attested, and receipt for the consideration money indorsed, signed and witnessed.

Nov. 22, 1873. THE said John Smith personally went before the steward of the said manor and of the courts thereof, and in consideration of the said sum of £800, so paid to him before the execution of the last abstracted indenture, did out of court surrender out of his hands into the hands of the lord of the said manor, by the hands, &c.:

THE premises aforesaid, by the description aforesaid;

AND the reversion, &c.;

AND all the estate, &c.:

Nov. 22, 1873. TO THE ONLY USE AND BEHOOF of the said George Jones, his heirs and assigns, for ever:

UPON CONDITION to be void on payment to the said George Jones, his heirs, executors, and administrators, of the said sum of £800, with interest, on the 30th day of April then next.

Apr. 15, 1881. BY A NOTICE in writing, under the hand of the said George Jones, he thereby gave notice to the said John Smith, and required him to pay at the expiration of two calendar months from the giving to or leaving for him of that notice the said principal sum of £800, and all interest, whichever should be then due thereon;

AND he did thereby further give notice, that if the said John Smith should make default in such payment, or either of them, he should proceed to sell the hereditaments described in the said conditional surrenders and indentures respectively, in pursuance and performance of the power for that purpose then vested in him, and contained or referred to in the said indentures respectively.

III. *ABSTRACT OF THE TITLE of* JOHN WILLIAM BACON, *Esq., to Freehold and Copyhold Estates at Hendon, in the County of Middlesex.*

36 H. 8, June 9. BY INDENTURE of this date, made between the King and the Dean and Chapter of St. Paul's, London,

RECITING a conveyance to the King of divers hereditaments in Essex, in consideration whereof

The King bargained and sold (inter alia),

The manor of Layton, cumptiis, late belonging to the priory of St. John of Jerusalem:

TO HOLD the same unto the Dean and Chapter of St. Paul's, and their successors, for ever, in Frankalmoyne, at the yearly rent of £33, 0s. 3d., clear of all other outgoings.

TAKEN and acknowledged 31st May, 36th Henry 8th, by Sir J. Rich.

EXECUTED by Dean and Chapter.

14 Eliz. Aug. 1, 1572. BY A GRANT from the Queen to the Dean and Chapter of the cathedral church of St. Paul's, London, and to their successors,

RECITING, that her father, Henry 8th, had, by his letters patent, given and granted to the said Dean and Chapter (inter alia), all his manor of Layton, in the county of Middlesex, hereinbefore mentioned.

TO HOLD the same to the said Dean and Chapter, and their successors, at the yearly rent of £33, 1s. 1d., for all rents and services to be rendered or paid:

IT IS WITNESSED, that for the considerations therein mentioned, the said Queen did give, grant, remise, and release to the aforesaid Dean and Chapter,

14 Eliz. Aug. 1, 1572. ALL the aforesaid yearly rent of £33, 1s. 1d., reserved as aforesaid by the thereinbefore recited letters patent:

TO HOLD the same to the Dean and Chapter, and their successors, for ever.

TO THE USE of the said Dean and Chapter, and their successors for ever.

AND FURTHER, that for the considerations aforesaid, the said Queen did grant to the aforesaid Dean and Chapter, that they should have her letters patent, duly made and sealed, without fine or fee whatsoever, the statute against putting lands and tenements into mortmain in anywise notwithstanding.

EXECUTED by the Queen herself at Gorhambury, 1st August, 1572.[1]

Nov. 3, 1797. 38 Geo. 3, c. 5, AN ACT OF PARLIAMENT, which granted an aid to his Majesty, by a land-tax to be raised in Great Britain for the service of the year 1798. (A printed copy accompanies this abstract.)

June 21, 1798. 38 Geo. 3, c. 60, AN ACT OF PARLIAMENT for making perpetual (subject to reduction and purchase) the several sums of money then charged in Great Britain as a land-tax for one year, from the 25th day of March, 1798.

SECTION 11 EMPOWERS all bodies politic, corporate or collegiate, and corporations aggregate or sole, seised or possessed of any manors, messuages, lands, tenements, or hereditaments, whereon any land-tax thereby made saleable shall be charged, to contract and agree for the reduction of such land-tax, or any part thereof, notwithstanding any statutes of mortmain or other statutes to the contrary.

SECTION 19 EMPOWERS all bodies politic, &c., in the actual possession of or entitled beneficially to the rents and profits of such manors, &c., under the restrictions or regulations thereinafter mentioned, to sell such part or parts of such manors, &c., as shall be eligible and necessary for the purpose of redeeming or purchasing such land-tax; and by indenture or indentures duly sealed and delivered, and enrolled for estates in England within six calendar months after the execution thereof in any of his Majesty's courts of record at Westminster, or registered in the counties of Middlesex and York, in the manner required by law, absolutely to convey the same, freed and discharged from land-tax, unto any person or persons whomsoever; or to charge a sufficient part of the said manors, &c., in manner therein mentioned.

(A printed copy of the Act accompanies this abstract.)

Mar. 21, 1799. 39 Geo. 3, c. 29, AN ACT OF PARLIAMENT to amend and render more effectual the two last-mentioned Acts;

[1] It seems to be the better opinion that the vendor would not be bound to furnish the purchaser with a copy of an ancient grant from the Crown; it is sufficient if he inform him of the place of its deposit.

Mar. 21, 1799. REPEATS various restrictive enactments in former Acts, and contains further enactments to amend those Acts.

(A printed copy of the Act accompanies this abstract.)

April 3, 1800. BY INDENTURE of bargain and sale, enrolled, between the Right Reverend Father in God George Lord Bishop of Lincoln, Dean of the Cathedral Church of St. Paul's, London, and the Chapter of the same Church, of the first part, the Right Honourable William Lord Auckland, and the Right Honourable Sylvester Douglas (two of the Commissioners appointed by his Majesty's letters patent under the Great Seal of Great Britain, by virtue of the 39th Geo. 3, entitled, &c., being the Act lastly before mentioned), of the second part, and John Ford, of the third part;

RECITING, that the said Dean and Chapter were desirous of availing themselves of the powers which, by the several before-mentioned Acts of the 38th and 39th of George the Third, were given to bodies corporate, for enabling them to sell a competent part of the manors, &c., for redeeming or purchasing their land-tax, and had contracted to sell to the said John Ford the freehold estate and premises hereinafter described, being part of the estates which the said Dean and Chapter were entitled to, in right of the said Chapter, for the sum of £10,942, 12s. 5d., and that the said Right Honourable Commissioners, parties thereto, had agreed to confirm such contract:

IT WAS WITNESSED, that in consideration of the sum of £10,942, 12s. 5d. by the said John Ford paid into the Bank of England, to be there placed to the account of the Commissioners for the Reduction of the National Debt, as by the receipt of R. Aslett, one of the cashiers of the bank, thereon indorsed did appear, the said Dean and Chapter, in exercise of the power vested in them by the several Acts hereinbefore referred to, did grant, bargain, sell, and convey by the now abstracting indenture, duly sealed and delivered, and intended to be enrolled or registered as the law required for the conveyance of estates sold to purchase or redeem land-tax, with the consent, authority, or approbation of the said Right Honourable Commissioners thereinbefore named, testified as therein expressed; and the said Commissioners did thereby confirm unto the said J. Ford and his heirs,

ALL that capital messuage, and site of the manor of Layton, with the appurtenances, situate in the parish of Hendon, in the county of Middlesex, together with all the outhouses, buildings, barns, stables, dovehouses, and other edifices, moats, ponds, yards, backsides, orchards, and gardens, to the said site and capital messuage of right belonging or appertaining: And also all demesne lands, meadows, &c.: And also all rents of assize, &c., excepting all that land or grove called the Priest's Grove, parcel of the demesnes of the said manor, containing by estimation one acre, and also excepting all lands, tenements, and hereditaments whatsoever, grantable by copy of court roll,

April 3, 1800. and all courts baron, courts leet, and view of frankpledge, and all customary courts, and all perquisites of courts, fines, and other profits, and the advowson of Friern Barnet; AND the reversion:

TO HOLD the same unto the said John Ford, his heirs and assigns.

TO THE USE of the said John Ford, his heirs and assigns, for ever, discharged from all land-tax and other incumbrances.

COVENANT by the said Dean and Chapter that they had not incumbered.

EXECUTED by the said John Ford, Lord Auckland and Sylvester Douglas, and the common seal of the said Dean and Chapter affixed thereto.

RECEIPT for consideration-money, under the hand of R. Aslett, thereon endorsed.

ENROLLED in the Court of Common Pleas, 4th Geo. 3rd, Roll, 106.

REGISTERED 14th March, 1807. B. 2, No. 471.

Jan. 3, 1834. WILLIAM FORD by his WILL,

AFTER RECITING that his son John William Ford had been disappointed of a legacy of £1,000, intended to have been bequeathed to him by his godmother, Mary Thompson, the late wife of Sir William Thompson, Bart., upon which he had relied to answer some temporary debts,

GAVE unto the said John William Ford the sum of £1,000 absolutely, and charged all his real estate with payment thereof, and subject thereto HE GAVE, devised, and bequeathed unto his own two sons, J. W. Ford, and Francis D'Arcy Ford, and to their heirs, executors, and administrators,

ALL his real and personal estates of whatever nature or kind soever, and wheresoever the same might be, and of which he might die seised or possessed,

IN TRUST, nevertheless, as to one equal third part thereof, to and for the use and behoof of his said son John William Ford, his heirs, executors, administrators, and assigns, for ever;

AND AS TO one third part thereof,

IN TRUST for his said son Francis D'Arcy Ford, his heirs, executors, administrators, and assigns, for ever.

AND AS TO the remaining third part thereof,

IN TRUST, that they his said two sons, their heirs, executors, or administrators, should pay the rents, issues, dividends, interest, and produce thereof, into the hands of his daughter Maria, then Maria Thompson, the wife of Sir William Thompson, Bart., to and for her own separate use during her life, and not to be subject to the debts, &c., of any husband, and her receipts to be discharges; and from and after the decease of his said daughter,

THEN IN TRUST for the child or children of his said daughter living at the time of her decease, to be divided between or amongst them, if more than one, in equal shares and proportions; or if there should be only one such child, then to such only child, his or her heirs, administrators, or assigns.

Jan. 3, 1834. BUT, in case his said daughter should have no issue, or no issue living at the time of her decease,
THEN he gave, devised, and bequeathed such remaining third part of the said estate and effects
UNTO his said two sons, their heirs, executors, administrators, and assigns, for ever, in equal shares.
AND the said testator appointed his said two sons executors of his will.
DULY executed by the testator in the presence of, and attested by: Hugh Green, Richard John Butten, and Spencer Ward.

July 7, 1835. THE SAID TESTATOR made a CODICIL to his said will, whereby he nominated and appointed his friend, Charles Anster, a trustee of his above-written will, to act in conjunction with his two sons, and that in as full and ample a manner as if he had been originally named a trustee in his said will.
DULY executed by the testator in the presence of, and attested by: Hugh Green, John Smith, and Benjamin Sadler.

Feb. 26, 1836. THE TESTATOR died, and was buried at Hendon.
THE said will and codicil were proved by the said John William Ford, and Francis D'Arcy Ford, only, in the Prerogative Court of Canterbury, the 16th May, 1836.
REGISTERED in Middlesex, 24th May, 1836, B. 3, No. 1816.

Apr. 30, 1836. Elizabeth Mary Ford, widow of the testator, John Ford, died, and was buried at Twickenham, Middlesex.

Dec. 2, 1846. BY a DECREE made in a cause wherein Francis D'Arcy Ford, Dame Maria Thompson, wife of Sir William Thompson, Bart., by the said Francis D'Arcy Ford, her brother and next friend, Georgiana Frances Amy Thompson, William Ford Thompson, D'Arcy Thompson, Anna Maria Thompson, Clara Thompson, and Arthur Luke Thompson, infants, by the said Francis D'Arcy Ford, their uncle and next friend, are plaintiffs, and John William Ford and Charles Anster, defendants.
IT WAS ORDERED, that the bill be dismissed against the defendant, Charles Anster, with costs, and the defendant, John William Ford, by his answer admitting the will of John Ford, the testator in the pleadings named, IT WAS DECLARED, that the same ought to be established, and the trusts thereof performed; And it was ordered and decreed accordingly.
AND the plaintiff, Francis D'Arcy Ford, submitting to account, IT WAS ORDERED, that it be referred to Master Harvey, to take an account of the personal estate, debts, &c., of the said testator; AND that the personal estate be applied in payment of his debts, funeral expenses, and legacies; AND that the said Master inquire whether there was any part of the said testator's estate now remaining outstanding and incapable of being got in; AND whether it would

Dec. 2, 1846. be for the benefit of Lady Thompson (Maria) and her children, that the defendant, John William Ford, should purchase certain household furniture and effects; AND to inquire what real estates the said testator was entitled to at the time of his death, and for what estates and interests, and to take an account of the rents and profits; AND to inquire whether there is any timber upon the said testator's real estates proper to be cut down; AND in case, upon taking the account of the personal estate, he should find that the same was not sufficient for the payment of debts, funeral expenses, and legacies, then to state to the Court what part of the said testator's real estate it would be advisable should be sold to make up such deficiency; AND he was to be at liberty, from time to time, to make a separate report or reports, and any of the said parties should be at liberty to apply.

July 3, 1848. THE SAID MASTER, by his report (after stating the amount of the receipts and payments by the executors, and the amount of the testator's debts), found that the said personal estate was greatly insufficient to pay the said testator's debts and legacies; AND he was of opinion that it would be for the benefit of the several parties interested in the said testator's estates, that the houses, buildings, and pieces of land which lay detached from the mansion-house at Layton, and grounds belonging thereto, should be sold to make up the deficiency; and in the second schedule to his report he had set forth a short description of the said premises proposed to be sold.

THE FIRST SCHEDULE to which the report refers contains the particulars of the debts due from the estate of the said testator, and of the legacies given by his will remaining unsatisfied.

THE SECOND SCHEDULE to which the report refers containing a description of the estates proper to be sold, and amongst the rest,

AN ESTATE, situate at Layton, in the county of Middlesex, consisting of the following particulars:

	A.	R.	P.
A newly erected house, barns, stables, yards, and garden	1	0	10
Red Field (alias Scott's Field)	8	2	0
Little Red Field	3	0	36
Brown's Close, next Freeman's	7	2	36
Upper Church Field	6	2	2
Freeman's Field	9	3	36
Dove Croft	1	3	37
New Inclosure	7	2	19
Ditto	8	2	21
Containing in the whole	A.55	0	37

In the occupation of Joseph Edwards, Esq., at the yearly rent of £300.

(This schedule does not contain any other part of the estates comprised in the present abstract.)

July 4, 1848. By an Order made in the said cause,

It was ordered, that the said Master's report be confirmed;

And that the several estates mentioned in the second schedule to the said report be sold, with the approbation of the said Master, to the best purchaser, in which sale all proper parties should join and produce all deeds, &c.;

And that the monies to arise by such sale should be paid into the bank in the name of the Accountant-General, and be laid out in the Three per Cents. in his name, in trust in the said cause.

July 8, 1848. Emily Thompson, another child of Sir William and Lady Thompson, was born. She was baptized at Croydon, Surrey.

Feb. 2, 1852. Decree on supplemental bill sets forth the birth of the said Emily Thompson, and decrees that she shall have the same benefit of the original bill as if she had been born before and made a party thereto.

Mar. 1, 1851. By a Deed Poll, under the hand and seal of the said Charles Anster,

Reciting the before abstracted will and codicil of the said John Ford, and his death;

And Reciting, that the said Charles Anster had never accepted the office of trustee given to him by the said codicil, or the devise and bequest implied by his nomination as trustee therein, nor had he ever acted or intended to act in the trusts of the said will.

It was witnessed, that the said Charles Anster did thereby absolutely renounce and disclaim

All and singular the lands, tenements, and hereditaments, goods, chattels, and real and personal estates of or belonging or late belonging to the said William Ford, deceased, devised and bequeathed in and by his said will and codicil, or either of them, and the devise thereof in the said codicil contained or implied, and the office of trustee by the said codicil given or intended to be given to him the said Charles Anster, and all right, &c.

Executed by the said Charles Anster, and attested.

Registered 27th May 1854, C. 2, No. 1312.

July 3, 1851. By an Order on further direction made in the said cause, after noticing the sale of part of the real estates, It was ordered, that a partition should be made of all the freehold and copyhold estates of which the said William Ford died seised or possessed then remaining unsold, and that a commission should issue for that purpose, directed to certain commissioners to be therein named, to divide the same into three equal parts, and that one third part thereof should be allotted as the share of the said defendant, Francis D'Arcy Ford; one other third part thereof as the share of the said John William Ford; and the remaining third part thereof should be allotted unto the said Francis D'Arcy Ford and John William Ford, upon the trusts, &c., and subject to the contingencies in the said testator's will expressed

July 3, 1851. concerning the remaining third part, and that the respective shares should be holden in severalty; and that after such partition should have been made, all proper persons should execute such conveyances as should be necessary for conveying the several shares so to be allotted to the parties to whom the same should respectively belong, to hold the same in severalty.

Sept. 5, 1851. Westminster, 5 Sept., 14 & 15 Vict. By a Commission made in the said cause, directed to Barnard Cranstoun Cocker, John Addison, William Pole Attfield, and Francis Giles, gentlemen;

After reciting the lastly before abstracted order,

It was made known, that the Queen did give full power and authority unto them, or any three or two of them, to survey the estates in question in the said order and pleadings of the said cause mentioned, and according to the best of their skill, knowledge, and judgment, make a fair partition, division, and allotment thereof; and the same separate, set apart, and divide into three equal parts, and allot and appoint one third part thereof as and for the share of the complainant, Francis D'Arcy Ford, and one other third part thereof as and for the share of the defendant, John William Ford, and the remaining third part thereof unto the said Francis D'Arcy Ford and John William Ford, their heirs, executors, administrators, and assigns, upon the trusts, &c., and subject to the contingencies in the said will expressed concerning the remaining third part; the said respective shares to be held in severalty: and the parts so divided to distinguish and separate by certain metes and bounds; and to return unto the said Court of Chancery their facts and proceedings in the premises by their certificate, fairly written on parchment, together with depositions and interrogations, closed up under the seals of them, or any three or two of them.

Mar. 3, 1852. By a certificate of this date under the hands and seals of the said William Pole Attfield, and Francis Giles, the acting commissioners in the said commission, it was certified that they, the said William Pole Attfield, and Francis Giles, had surveyed the estate in question, in the order and pleadings of the said cause mentioned; and had, according to the best of their skill, knowledge, and judgment, made a fair partition, direction, and allotment thereof, and had separated, set apart, and divided the same into three equal parts, as by the said commission was directed, and had allotted and appointed, and did thereby allot and appoint unto the said John William Ford (inter alia),

> All that capital messuage or mansion-house, with the outhouses, barns, stables, yards, orchards, gardens, and appurtenances, called the Manor Farm, situate in Layton aforesaid, in the tenure or occupation of the defendant, John William Ford, and the site of which mansion-house, yards, gardens and orchard contained by estimation 1a. 0r. 10p. or thereabouts;
>
> And all those several closes, pieces, or parcels of land, arable, meadow, pasture and wood, situate in Layton aforesaid, commonly called the Manor Farm, that is to say, All that close,

Mar. 3, 1852. piece, or parcel of arable, meadow, or pasture land, commonly called the Thither and Farther Home Fields, and small close, containing by estimation 5a. 1r. 3p., bounded on the north in part by Hendon Watch estate, in part by Church Meadow, and in part by Manor House Garden and Farm; on the south, in part by Pond Field, otherwise Pound Field, and in part by Four Acres, and on the west, by three Corner Field and Six Acres.

AS and for the share of the said John William Ford, which third part or share so allotted and appointed to the said John William Ford is comprised in that part of the map or plan thereunto annexed, which is distinguished by a blue tint or shade encircling the same, and is marked No. 3. AND they further allotted and apportioned unto the said John William Ford, ALL the timber and timber-like trees, underwood, and fallers then being on that part of the lands and premises thereinbefore to him allotted and apportioned. AND they further certified that the said partitions and divisions were in due proportions, &c.

EXECUTED by the said William Pole Attfield and Francis Giles, and attested by two witnesses.

Mar. 9, 1852. THE said CERTIFICATE was absolutely confirmed by an ORDER of the said Court of Chancery.

June 2, 1852. 3 Geo. 4, By an ACT OF PARLIAMENT intituled "An Act for carrying into effect a Partition of Real Estates devised by the Will of John Ford, Esq., and other Purposes, relating to such Estates."

RECITING as in the said Act is recited, a printed copy of which accompanies this abstract.

IT IS ENACTED, that the said partition and allotments of the freehold and copyhold estates described in the said certificate of partition (being the estates comprised in the three schedules to that Act), should be and were thereby established, ratified and confirmed.

AND that all the said freehold and copyhold messuages, farms, lands, tenements, and hereditaments which in and by the aforesaid certificate were expressed to be thereby allotted to the said John William Ford, as and for his part or share in severalty of the estates directed by the said Court of Chancery to be divided as aforesaid, which estates and premises are particularly described in the third schedule to the said Act, with their appurtenances, should be vested in and stand settled and assured upon and to the use of Richard Cooper the younger, his heirs and assigns for ever, In trust for the said John William Ford, his heirs and assigns, for ever.

PROVISO, That no person not being tenant to the lord should by virtue of that Act only become tenant of the said copyhold premises without an admission thereto by the lord of the manor, so as to entitle the lord to all such fines, &c., as he would have been entitled to if that Act had not passed; and that it should be lawful for any person who had any legal estate in the copyhold hereditaments thereby settled, to make any

June 2, 1852. surrender or customary assurance of the same, To the uses and for the purposes of that Act, notwithstanding the limitations, trusts, or dispositions of the said will and codicil.

THE USUAL SAVING CLAUSE,

AND that the Act should be printed by the King's printer, and a copy thereof so printed should be admitted as evidence by all judges, &c.

THE THIRD SCHEDULE to which the Act refers [being the allotments to the said John William Ford] contains (inter alia),

	A.	R.	P.
Manor House yards and farms . . .	1	0	10
Manor House plantation (copyhold) . .	0	3	23
Further Home Field, Hither Home Field, and Small Close	5	1	3

Timber and timber-like trees.

Aug. 4, 1852. INDENTURE of MORTGAGE of this date, &c.

IV. *ABSTRACT OF THE TITLE of* Mrs. JANE PARSONS, *Widow (selling under the powers given to Limited Owners by the Settled Land Act*, 1882), *of Cheapside, in the City of London, to a Leasehold House and Premises, in Queen Street, in the Parish of St. Dunstan in the East, London.*

Dec. 6, 1854. BY INDENTURE OF LEASE BETWEEN Robert Good, of the first part, John Taylor and James Brindall (administrators of all the goods, chattels, rights, and credits, of Robert Tudor, late citizen and builder of London, deceased), of the second part, and James Head of the third part; whereby, for the considerations therein mentioned,

SAID Good, with the assent and by the direction of said Taylor and Brindall, DID DEMISE, lease, and to farm let unto said Head, his executors, administrators and assigns,

ALL that piece or parcel of ground situate, lying, and being on the west side of a new street, called or designed to be called Queen Street, lying on the south side of King Street, in the parish of Saint Dunstan in the East, London, containing in front next Queen Street aforesaid, from north to south, 16 feet and 1 inch of assize; in the rear or back part thereof, from north to south, 61 feet and 3 inches of assize; and in depth on the north side, from east to west, 44 feet of assize; then turning northward 8 feet and 6 inches of assize; and from thence extending westward to the rear or back part of the said piece or parcel of ground, 40 feet of assize; and in depth on the south side, from east to west, 85 feet and 9 inches of assize; then turning southward 10 feet and 2 inches of assize; and from thence extending westward to the rear or back part of the said ground 3 feet and 9 inches of assize; and which said piece or parcel of ground doth abut east on Queen

Dec. 6, 1854. Street aforesaid, west on ground of William Watts, north on ground built or intended to be built on by him, the said James Head, and Isaac Lewis, and is more particularly mentioned and described in the plan or ground plot thereof, drawn and delineated in the margin of the now abstracting indenture. Together with the said brick messuage or tenement lately erected and built on part of the said piece or parcel of ground, and all other erections and buildings now erected and built or to be erected and built upon the said piece or parcel of ground, or any part thereof, Together also with all ways, &c.

TO HOLD the same, with their appurtenances, unto the said Head, his executors, administrators, and assigns, from the 29th day of September, which was in the year 1854, for the term of ninety-nine years from thence next ensuing, at the rent of one peppercorn for the first two years and three quarters of a year, and at the yearly rent of £3, 16s. for the remaining ninety-six years and one quarter of a year, payable quarterly.

COVENANTS by said Head with said Good, to pay rent, to build said messuages, to insure in Hand-in-Hand or Westminster Insurance Office to the highest value said offices commonly insure on houses; to repair, &c.; to leave, &c., at end of term; that lessors may enter and view said premises and give three months' notice of want of repair; to repair accordingly; and not to let, &c., to a victualler, without license of said Good.

PROVISO for re-entry on non-payment of rent.

COVENANTS by said Good, that he had right to demise and lease; and for quiet enjoyment.

COVENANT by said Good for quiet enjoyment.

EXECUTED by said Good, Taylor, and Brindall, and attested.

July 1, 1855. BY INDENTURE OF MORTGAGE between said Head, of the one part, and said Taylor, of the other part.

RECITING the before abstracted indenture of lease;

IT WAS WITNESSED, that in consideration of the sum of £1,500, said Head did grant, bargain, sell, assign, and set over unto said Taylor, his executors, administrators, and assigns,

THE said indenture of lease;

ALL said premises;

AND all the estate, &c.:

TO HOLD unto said Taylor, his executors, administrators, and assigns, from thenceforth for residue of said term of ninety-nine years.

PROVISO for redemption on payment of principal and interest on 12th January then next.

COVENANTS for payment of principal and interest, for title, &c.

EXECUTED by said Head, and attested.

RECEIPT for consideration indorsed.

Dec. 2, 1855. BY INDENTURE, indorsed on last abstracted indenture, BETWEEN said Taylor, of the one part, and George Balls, of the other part,

Dec. 2, 1855. RECITING that within-mentioned principal sum was owing, with £33, 6s. for the interest thereof;

Said Taylor, in consideration of £1,533, 6s., paid by said George Balls, did bargain, sell, assign, transfer, and set over unto said George Balls, his executors, administrators, and assigns,

Said indenture of lease and indenture of mortgage; and

THE aforesaid premises, principal and interest;

AND all his estate, &c.:

TO HOLD unto said Balls, his executors, administrators, and assigns, from thenceforth for remainder of said term of ninety-nine years.

SUBJECT to right of redemption by said Head.

COVENANT by said Taylor, that he had done no act to incumber.

EXECUTED and attested.

RECEIPT for consideration signed and attested.

Nov. 7, 1859. BY INDENTURE OF ASSIGNMENT, BETWEEN said Balls, of the first part; said Head, of the second part; and John Parsons, of the third part;

RECITING the before abstracted indentures of lease and mortgage, and the before abstracted deed poll;

RECITING, that the principal sum of £1,500 was then owing to said Balls, together with £82, 14s. 9d. for the interest thereof;

IT WAS WITNESSED, that in consideration of £1,582, 14s. 9d. to said Balls paid by said Parsons (by the direction and appointment of said Head, testified, &c.), AND also in consideration of £317, 5s. 3d. to said Head paid by said Parsons and Balls (by the direction and appointment of said Head, testified as aforesaid), Balls did bargain, sell, assign, and set over, and said Head did fully and absolutely bargain, sell, assign, set over, release, ratify and confirm unto said Parsons, his executors, administrators, and assigns, as well

THE said premises;

AND all the estate, &c.:

TO HOLD with their and every of their appurtenances, unto said Parsons, his executors, administrators, and assigns, from thenceforth for the remainder of the said term of ninety-nine years.

COVENANT by said Balls, that he had done no act to incumber.

COVENANTS by said Head that lease was valid; that said Balls and Head, or one of them, had full power to assign; for quiet enjoyment, free from incumbrances;

AND for further assurance.

EXECUTED by said Balls and Head and attested.

RECEIPTS for respective considerations indorsed.

April 2, 1876. BY WILL of this date said John Parsons gave and bequeathed All his real and personal estate in the following words, namely:—

"ALL my lands, tenements, hereditaments, and real estate whatsoever and wheresoever (including leaseholds), which I am seised or entitled unto, and all my moneys, stocks, funds, and securities, and other personal estate whatsoever."

April 2, 1876. UNTO Henry Thomas and Richard Goodchild, their heirs, executors, administrators, and assigns, upon the trusts and for the intents and purposes following, viz. :—

UPON TRUST as soon as conveniently might be after his said testator's decease, to call in and enforce payment of all debts, sum and sums of money which should be due to him upon mortgage or other security, and also to sell and convert into money all such other parts of his estate and effects as should not then consist of money in any manner they should deem most expedient and for the most money that they could obtain for the same, or as should to them seem most reasonable.

AND as to the moneys to be so, or in any other manner received under or by virtue of the now abstracting will,

UPON TRUST, to pay his said testator's debts, funeral, and testamentary expenses, and the pecuniary legacies thereinafter mentioned, and after payment thereof

UPON TRUST, to lay out and invest the surplus in their or his own name or names in the parliamentary stocks or funds of Great Britain, or upon real securities at interest, with power to vary and transpose the same from time to time as often as they or he should think fit, and to pay the interest, dividends and annual produce thereof to his wife, said Jane Parsons, during her life, and after her decease upon the trusts therein mentioned.

AND THE TESTATOR declared that his said trustees or trustee might postpone the sale and conversion of his real and personal estate, or any part thereof, as long as they should think fit, but that his real estate should be considered and treated as personalty, and that until such sale and conversion, his said trustees or trustee should pay and apply the rents, profits, and annual income of his real and personal estate, or of so much thereof as should for the time being remain unsold or unconverted, upon the trusts and for the purposes by his said will declared of and concerning the interest, dividends, and annual income of the proceeds of such sale and conversion as thereinbefore mentioned.

AND THE TESTATOR appointed said Henry Thomas and Richard Goodchild, and his wife, said Jane Parsons, executors of his said will.

EXECUTED in the presence of, and attested by two witnesses.

Oct. 20, 1879. THE SAID John Parsons died.

Dec. 3, 1879. THE WILL of the said John Parsons was proved by said Henry Thomas, Richard Goodchild, and Jane Parsons, the executors and executrix thereof, in the Principal Registry of the Probate Division of Her Majesty's High Court of Justice.

Abuse of Process.—Apart from rules and orders, every Court of Justice has an inherent jurisdiction to protect itself from the abuse of its own process (*Metro. Bank* v. *Pooley*, 1885, 10 App. Cas. 210). Formerly this jurisdiction was usually applied on the hearing of a demurrer, which has now been abolished (R. S. C. Ord. 25, r. 1), and though the inherent jurisdiction of the Court remains and can still be invoked, the old demurrer has, for most purposes, been replaced by procedure under Order 25, r. 4, which gives the Court power to stay or dismiss an action shown by the pleadings to be frivolous or vexatious; or, in the case of a defence, to order the defence to be struck out and judgment entered accordingly (*Reichel* v. *Magrath*, 1889, 14 App. Cas. 665). The Court, on an application of this nature, must use a judicial discretion, and not prevent a suitor from exercising his rights on any vague or indefinite principle (*Higgins* v. *Woodhall*, 1889, 6 T. L. R. 1, C. A.).

Order 25, r. 4, of the Rules of the Supreme Court is confined to pleadings which disclose "no reasonable cause of action or answer," and on an application under that rule it is not admissible for the opposite party to disprove by affidavit the statements in the pleading impugned. Nor will this be allowed on an application under the inherent jurisdiction of the Court to prevent abuse of its process. But under the inherent jurisdiction the Court may receive evidence of extraneous facts directed to show that the document in question is an abuse of the process of the Court. Thus in *Remmington* v. *Scoles*, [1897] 2 Ch. 1, the pleading impugned was in proper form, and on the face of it was in order, but Romer, J., admitted affidavit evidence to show that it was a sham defence set up for the sole purpose of delay, and he ordered it to be struck out. His decision was upheld on appeal.

It is an abuse of the process of the Court for a litigant, either by action or pleading in an action, to set up a case which has been previously decided by a Court of competent jurisdiction, unless the first decision was obtained in a foreign court (*Reichel* v. *Magrath*, 1889, 14 App. Cas. 665, *supra*; *Montgomery* v. *Russell*, 1894, 11 T. L. R. 112, C. A.; *Stephenson* v. *Garnett*, [1898] 1 Q. B. 677). But it must be clear that the point decided in the first action was in fact identical with that raised by the second action (*Lea* v. *Thursby*, 1904, 89 L. T. 744; 90 L. T. 265, C. A.). Where an action was commenced in England, and the indorsement included a claim which was substantially the same as one decided in a Scotch action, and was the subject of a pending appeal to the House of Lords, the Court of Appeal struck out the English writ with costs, as an abuse of process (*Huntley, Marchioness of*, v. *Gaskell*, [1905] 2 Ch. 656, C. A.).

The case of a judgment obtained in a foreign court stands on a somewhat different footing, for although the English Court might interpose to stay a second action in England for the same purpose, as an abuse of its process (see *Rio Tinto Copper Co.* v. *Société des Metaux*, 1890, 6 T. L. R. 408), such second action may be supported where it is not clear that the judgment of the foreign court was final and conclusive (*Nouvion* v. *Freeman*, 1889, 15 App. Cas. 1), or where there is an allegation that it was obtained by fraud (*Codd* v. *Delap*, 1905, 92 L. T. 510, H. L.).

An action may be stayed as vexatious and oppressive when it is brought in England in respect of a cause of action arising out of the

jurisdiction, even though no action has been brought in the Court within the jurisdiction of which the cause of action arose, if the English Court is satisfied that the plaintiff would suffer no injustice by having to sue in the foreign court, whereas the defendant would suffer substantial injustice by having to defend the action in the English Court (*Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141). See also STAY OF PROCEEDINGS.

Power to Prevent Abuse of Process.—In the cases cited above the jurisdiction of the Court to prevent abuse of process was exercised merely to nullify proceedings already taken. That jurisdiction extends to prohibiting individuals who are shown to have persistently abused the process of the Court by frivolous and vexatious applications from making any applications whatever without having first obtained the sanction of the judge or master. The first case in which this was done appears to have been *Suir* v. *Newton*, in 1886 (unreported, but referred to 37 Ch. D. 169, note), in which the Court of Appeal prohibited the defendants from giving any notice of motion in the action, without special leave of the Court, until the costs of a previous order against them had been paid, and directing that, if any such notice were given without leave, the respondent should not be required to appear, and that such motion should be dismissed without being heard. In *Grepe* v. *Loam*, 1887, 37 Ch. D. 168, C. A., certain parties interested were shown to have made several unfounded applications after judgment, directed to impede or nullify the effect of the judgment, and the Court prohibited these parties from making any applications without the leave of the Court being first obtained. This case has been followed with regard to interlocutory applications (*Kinnaird* (*Lord*) v. *Field*, [1905] 2 Ch. 306, C. A.). The form of order in the last named case was as follows:—

> "This Court doth order that the defendant is not to be allowed without the leave of the judge in chambers to make any application under the summons for directions, or to issue any summons on matters of procedure, or to serve any notice of motion to discharge any order in chambers made on any such application as aforesaid, without such leave: And in case he shall without such leave serve notice of any such application or summons or notice of motion as aforesaid on the plaintiffs, they are not to attend unless the judge on the return thereof shall so direct; and unless the judge shall think fit to give such directions, the application shall be dismissed without being heard: And it is ordered that the plaintiff's costs of this application be borne by the defendant in any event."

A further safeguard has been provided for preventing persons so disposed from abusing the process of the Court by commencing groundless actions and other proceedings. The Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), provides that it shall be lawful for the Attorney-General to apply to the High Court for an order under the Act, and if he satisfies the High Court that "any person has habitually and persistently instituted vexatious legal proceedings, without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior Court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him the opportunity of being heard, and after assigning counsel in case

such person is unable on account of poverty to retain counsel, prohibit such person from taking proceedings in any Court without leave of the Court, or some judge thereof." Leave can only be granted on evidence that the proposed proceeding is not an abuse of the process of the Court, and that there is *primâ facie* ground for such proceeding. A copy of the order must be published in the *London Gazette*. The Act applies only to England. See VEXATIOUS INDICTMENTS.

Acceleration.—The falling into possession of an estate or interest in remainder or expectancy, by reason of the particular estate or preceding interest being or becoming void. Thus, if lands be devised to an attesting witness of a will with a remainder over, the remainder takes effect at once (*Jull* v. *Jacobs*, 1876, 3 Ch. D. 703). In *Lainson* v. *Lainson*, 1854, 5 De G., M. & G. 754; 43 E. R. 1063, it was held that a remainder was accelerated by a revocation by a codicil of a life estate given by a will. It would seem from this case, and from *Clark* v. *Randall*, 1886, 31 Ch. D. 72, that the same principles apply to personalty and real estate as regards acceleration. The doctrine does not in general extend to appointments under powers. In *Crozier* v. *Crozier*, 1843, 3 Dru. & War. 365, Lord St. Leonards stated that in cases of appointments by powers, although the estate for life is void, yet the remainder continues such, and the estate during the life of the intended taker goes as in default of appointment. In *Craven* v. *Brady*, 1867, L. R. 4 Eq. 209, Lord Romilly took an opposite view, but in that case there was a clear intention expressed in the will that, if the appointed life interest should cease by reason of forfeiture, then the estate appointed in remainder should take effect immediately. It should be noticed that, though he referred to *Crozier* v. *Crozier*, he said nothing of the passage in the judgment of Lord St. Leonards cited above.

[See also *Ajudhia Buksh* v. *Musamut Rukmin Kuar*, 1883, L. R. 11 Ind. App. 1; *Eavestaff* v. *Austin*, 1854, 19 Beav. 591; 52 E. R. 480; *In re Townsend*; *Townsend* v. *Townsend*, 1887, 34 Ch. D. 357; *In re Johnson*; *Danily* v. *Johnson*, 1893, 68 L. T. 20; *Aplin* v. *Stone*, [1904] 1 Ch. 543.]

Acceptance in Blank. See BILLS OF EXCHANGE.

Acceptance of Bill. See BILLS OF EXCHANGE.

Acceptance of Money paid into Court. See PAYMENT INTO COURT.

Acceptance of Offer. See CONTRACT.

Acceptance of Office of Director. See COMPANY.

Acceptance of Service.—The two rules of the Supreme Court (Ord. 9, r. 1; Ord. 12, r. 18) on which the practice is based as to acceptance of service of process originating proceedings in the High Court, contain an ambiguity which is somewhat misleading. The first-named rule provides that, after a defendant or respondent by his solicitor undertakes in writing to accept service and enters an appearance, no actual service of the writ shall be required. The last-named

rule provides that a solicitor not entering an appearance, or putting in bail, or paying money into Court in lieu of bail in an Admiralty action *in rem* in pursuance of his written undertaking so to do, shall be liable to an attachment. The acceptance of service referred to in the first rule is of no binding effect until after an appearance has been entered. The written undertaking to appear is a binding contract, and will be enforced by the Court in a proper case, even though the writ is more than a year old, and no actual service has been effected (*Re Kerly*, [1901] 1 Ch. 467, C. A.).

In ordinary practice between solicitors the two transactions above described are dealt with as one. The writ is left with the defendant's solicitor who has agreed to accept service, and such acceptance is written by the latter in the margin of the writ. It is important, therefore, that the plaintiff's solicitor should, on receiving such acceptance of service, see that it contains also an undertaking to appear in due course, otherwise it is of no binding effect (*The Anna and Bertha*, 1891, 64 L. T. 332), and does not, in case no appearance is entered, obviate the necessity for personal service. See *Form, infra.*

The origin of Ord. 12, r. 18, which renders a solicitor who undertakes to appear liable to an attachment for breach of his undertaking, is rule 3 of the Regulæ Generales of Hilary Term, 1853, which is in the same words, except that it did not contain the clause as to an undertaking to put in bail, or pay money into Court in lieu of bail, in an Admiralty action *in rem.*

A solicitor who accepts service and undertakes to appear must have his client's authority to do so, and such authority must apply specially to the action or proceeding (*Re Gray*, 1891, 65 L. T. 743).

Acceptance of service and undertaking to appear have no application in divorce proceedings. The citation must be served personally (*De Niceville* v. *De Niceville*, 1877, 37 L. J. Mat. 43). A solicitor duly authorised by a limited company against which a petition for winding-up is presented, may accept service for the company, and enter appearance, whereupon service of the petition at the registered office of the company becomes unnecessary (*Re Regent United Service Stores*, 1878, 8 Ch. D. 75).

Acceptance of service does not apply to any proceeding subsequent to the writ of summons, or other originating process by which an action or matter is commenced. As to service generally, see SERVICE.

ACCEPTANCE OF SERVICE.

I accept service of this writ on behalf of the defendant [*naming him, if there be more than one defendant in the action*], and undertake to enter an appearance for him thereto in due course.

(*Date.*) (*Signed*) ———.

[*Solicitor for the Defendant.*]

Acceptance of Shares. See COMPANY.

Access of Husband to Wife. See LEGITIMACY.

Access to Air. See AIR.

Access to Highway. See HIGHWAY.

Access to Infant. See PARENT AND CHILD.

Access to Rivers. See WATERWAY.

Accession of Property.—Where any corporeal substance, over which rights of property are exercised, receives an addition, increase or improvement, either in a natural way, as by the growth of fruits or the pregnancy of animals, or in an artificial way, as by the erection of houses on land, or the embroidering of cloth, such addition, increase or improvement falls primarily to the owner of the original substance, subject in the second case to his paying compensation for material or labour expended. In a few instances, as where wine, oil and bread are manufactured from another's grapes, olives and flour, or a picture is painted on another's canvas, an exceptional rule prevails, the new products going to the operator, subject to his compensating the owner of the materials. Two questions thus arise—(1) Which substance is of principal importance; and (2) What compensation, if any, is payable? There are four classes of accession: (1) land to land (see ACCRETION; ALLUVION); (2) moveables to land (see FIXTURES); (3) moveables to moveables; and (4) moveables to labour (see COMMIXTURE; CONFUSION; SPECIFICATION). [See Sohm's *Institutes of Roman Law*, 2nd ed.; Hunter's *Roman Law*, 4th ed.]

Accession of Sovereign.—The accession of a new sovereign takes place immediately on the death of the preceding monarch. Blackstone says (1 *Com.* 249), that "immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any interregnum or interval, is vested at once in his heir, who is *eo instanti* king to all intents and purposes." This doctrine, which is expressed in the maxim, "The king never dies," has been established law ever since the reign of Edward IV., before which time there were still traces of the elective origin of the monarchy. The legal effects of a demise of the Crown, which were formerly far greater than at present, will be discussed under DEMISE OF THE CROWN; [and see the Demise of the Crown Act, 1901, 1 Edw. VII. c. 5. The Royal Titles Act, 1901, 1 Edw. VII. c. 15, enabled His Majesty King Edward VII. to make by proclamation under the Great Seal of the United Kingdom, such addition to the style and titles then appertaining to the Imperial Crown of the United Kingdom and its dependencies as to His Majesty might seem fit]. The proceedings on the accession of a new sovereign are described in Anson's *Law and Custom of the Constitution*, vol. ii. p. 64. "A few hours after the death of William IV., Queen Victoria was proclaimed Queen, at Kensington Palace, as set forth in the proclamation, by the Lords spiritual and temporal of this realm, being here assisted with these of His late Majesty's Privy Council, with numbers of others principal gentlemen of quality, with the Lord Mayor, Aldermen and citizens of London." This body is said by Sir William Anson, citing *Hansard*, xxxix. 13, to represent a more ancient assemblage than the Privy Council, the *Witan* or *Commune Concilium* meeting to choose and proclaim the new king. The Queen then entered the room, addressed the Council, and took and subscribed the oath for the security of the Church of Scotland prescribed by the Act of Union with Scotland. The members of the late king's Privy Council were sworn in

as members of Her Majesty's Privy Council, and a proclamation was issued continuing all officers under the Crown in their offices. Some months later the Queen made the Declaration against Transubstantiation, according to the requirements of the Bill of Rights, 1 Will. & Mary, sess. 2, c. 2, which provides that a new sovereign "shall, on the first day of the meeting of the first Parliament next after his or her coming to the Crown, sitting in his or her throne in the House of Peers in presence of the Lords and Commons therein assembled, or at the coronation, whichever shall first happen, make, subscribe and audibly repeat the Declaration against Transubstantiation," as settled in 30 Chas. II. c. 2. [The same procedure was followed on the accession of His Majesty King Edward VII., the question of the modification of the Declaration against Transubstantiation, so as to avoid the offence which, in its present form, it gives to Roman Catholics, has been raised, but has not yet been settled by legislation.]

Accessory (*Accessarius*).—A term derived from scholastic logic, and used in law to discriminate certain classes of accomplices from principal felons. There are no accessories in treason (Fost. 341-346), or misdemeanor (*R.* v. *Burton*, 1875, 13 Cox C. C. 71; 1 Russ. on *Crimes*, 6th ed., 174); but a person who "abets, counsels, procures, or commands" a misdemeanor at common law, or under any Act passed before or since 1861, is triable and punishable as a principal offender (24 & 25 Vict. c. 94, s. 8; and see Arch. Cr. Pl., 23rd ed., 16, 1300).

1. An accessory *before the fact* is a person who "counsels, incites, moves, procures, hires, or commands," *i.e.* deliberately *instigates*, either personally or through a third person, others to commit a felony which is committed in his absence, but as the direct natural or probable result of his instigation (Fost., 2nd ed., 121-131, 369-372). He is distinct from a person who solicits, *i.e.* ineffectually endeavours to induce, another to commit felony (*R.* v. *Gregory*, 1866, L. R. 1 C. C. R. 77; Arch. Cr. Pl., 23rd ed., 1293), and from one guilty of misprision of felony, *i.e.* who merely omits to give warning of a felony which he knows is about to be committed, or to give information of a felony which he knows to have been committed (Hawk., P. C., bk. ii. c. 29, s. 23; 1 Russ. on *Crimes*, 6th ed., 170; Arch. Cr. Pl., 23rd ed., 16, 1308). The instigator, to be an accessory, must be so far away from the *locus delicti commissi* as not to be in a position to facilitate its commission (*R.* v. *M'Daniel*, 1755, 10 St. Tri. 147; Fost., 2nd ed., 121, etc.).

There being no agency in crime (see PRINCIPAL AND AGENT), a person accepting employment to commit felony becomes a principal, and the employer, if absent when the crime is committed, is an accessory before the fact. But where an innocent agent is employed to commit a felony, *e.g.* uttering a forged cheque, or delivering poison intended to cause death, the instigator, the employer, though absent when the felony takes effect, is a principal and not an accessory (*R.* v. *Bull*, 1845, 1 Cox C. C. 281; 1 Russ. on *Crimes*, 6th ed., 165, 167; *R.* v. *Manley*, 1844, 1 Cox C. C. 104; Arch. Cr. Pl., 23rd ed., 12, 1300).

The distinction between principals and accessories before the fact was material only so far as the punishment of the two was different, and because, at common law, conviction and attainder of one of the principals was necessary before an accessory could be tried, except by his own consent (Fost., 2nd ed., 360-368). Attainder was abolished by the For-

feitures Act, 1870, 33 & 34 Vict. c. 33, s. 1; and now accessories before the fact to any felony at common law, or under any statute (subject to any specific statutory exception), may be tried, convicted, and punished in all respects as if they were principal felons, without waiting for the trial of the principal felon (24 & 25 Vict. c. 94, ss. 1, 5; *R.* v. *James*, 1890, 24 Q. B. D. 439). Similar provisions are contained in the other Consolidation Acts of 1861 (24 & 25 Vict. c. 96, s. 98 (*larceny*); c. 97, s. 56 (*malicious damage*); c. 98, s. 49 (*forgery*); c. 99, s. 35 (*coinage offences*); c. 100, s. 67 (*offences against the person*)); in the Piracy Act, 1837, 7 Will. IV. & 1 Vict. c. 88, s. 4; in the Treason Felony Act, 1848, 11 & 12 Vict. c. 12, s. 8; and in the Explosives Act, 1883, 46 & 47 Vict. c. 3, s. 7.

2. An accessory *after the fact* is a person who, with knowledge or notice, after the commission of a felony, harbours, receives, relieves, comforts, assists, or maintains any person whom he knows to have been concerned in its commission (other than his or her wife or husband), *i.e.* who takes any active steps to shelter the felon from justice or to enable him to escape from justice, by concealing him or rescuing or releasing him from custody or otherwise—or it would seem by enabling him to get rid of his booty or the evidence of his felony (Fost., 2nd ed., 373; 3 Co. Inst., 138; Hawk., P. C., bk. ii. c. 29; 1 Russ. on *Crimes*, 6th ed., 176; Arch. Cr. Pl., 23rd ed., 19, 1305). According to Hale (1 P. C., 613), there are no accessories *after the fact* in misdemeanor. But in *R.* v. *Bubb*, 1906, 70 J. P. Rep. 143 C. C. R., it was suggested that the question has not been decided; and some of the acts which in the case of felony would constitute an accessory after the fact would in misdemeanor be indictable as a conspiracy to defeat or prevent the course of justice, or as rescue or interference with officers of justice (Hawk., P. C., bk. ii. c. 29, s. 4; 1 Russ. on *Crimes*, 6th ed., 164; 3 Co. Inst. 139). A receiver of stolen goods was not treated as accessory after the fact till 3 & 4 Will. & Mary, c. 9 (see Fost., 2nd ed., 377). Accessories after the fact are guilty of felony, and (in the absence of other express statutory provision, as in the case of murder, 24 & 25 Vict. c. 100, s. 67) are punishable by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 94, s. 4).

Accessories before or after the fact can be tried either with the principal felon, or after him as accessories, or separately as for a substantive felony (24 & 25 Vict. c. 94, ss. 3, 5). A conviction as accessory after the fact cannot legally be obtained on an indictment charging the accused only as a principal offender (*Richards* v. *R.*, 61 J. P. 389; and cf. *R.* v. *Bubb*, *ubi supra*). But a man may be charged in one Court as a principal felon and in another as accessory after the fact (see Arch. Cr. Pl., 23rd ed., 1307). And any number of accessories before or after the fact at different times can be tried together (24 & 25 Vict. c. 94, s. 6). As to forms of indictment, see Arch. Cr. Pl., 23rd ed., 1303-1306, and end of article. The proper place for the trial of accessories is—(1) In the case of a felony wholly committed in England, any Court which can try the principal offender, or can try felonies in the place where the act constituting the accessory was done; (2) in the case of a felony committed partly on sea and partly on land, within or without the King's dominions, the Court which can try the principal offender or can try felonies committed in the county or place in which

the accessory is apprehended or is in custody (24 & 25 Vict. c. 94, s. 7).

[On this subject, see further, Stephen, *Dig. Crim. Law*, 6th ed., art. 40 *et seq.*; Stephen, *Hist. Crim. Law*, ii. 229; Pollock and Maitland, *Hist. Eng. Law*, ii. 508; Hawk., P. C., bk. ii. c. 29; Hale, P. C., 612-626; Foster, 2nd ed., 341-375; Arch. Cr. Pl., 23rd ed., 16-21, 1300-1308; 1 Russ. on *Crimes*, 6th ed., 169-181; Mayne, *Criminal Law of India*, ed. 1896, 429-457.]

FORMS OF INDICTMENT.

1. *Accessories before the Fact.*

[*After charging the offence of the principal offender* (A. B.), *continue*]—And the jurors aforesaid, on their oath aforesaid, do further present that C. D., before the said felony was committed in manner and form aforesaid, to wit, on the 7th day of May in the year aforesaid, feloniously did * counsel, procure and command the said A. B. the said felony, in manner aforesaid, to do and commit against the form of the statute, etc., and against the peace.

* [*In framing the count, reference should be made to the Accessories and Abettors Act*, 1861, *and to the special statute, if any, defining the acts which constitute an accessory.*]

[*This form can be used, with the necessary modifications, whether the principal is or is not to be tried with the accessory.*]

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2. *Accessories after the Fact.*

[*After charging the offence of the principal offender* (A. B.), *continue*]—And the jurors, etc., . . . present that C. D., well knowing the said A. B. to have committed the said felony in manner aforesaid, afterwards, to wit, on the 7th day of May in the year aforesaid, the said C. D. feloniously did receive, harbour and maintain against the form, etc., and against the peace, etc.

Accident.—The word "accident" is constantly used in ordinary English, and therefore in law, in two senses, one much wider than the other. Strictly, an occurrence can only be said to be accidental when it is due neither to design nor to negligence. For, if an act be intentional, it is clearly no accident; if it be the result of culpable negligence, then by due care it could have been avoided, and the negligent person cannot be allowed to excuse himself by declaring it an accident. In this narrower sense of the word, an accident must be "nobody's fault" (12 App. Cas. 526). Any injury caused by lightning, tempest, or any extraordinary rainfall—any *vis major* or "act of God"—is accidental and therefore not actionable (*Nichols* v. *Marsland*, 1876, 2 Ex. D. 1; *Nugent* v. *Smith*, 1876, 1 C. P. D. 423; see ACT OF GOD). The sudden and unexplained bolting of a horse would also be an accident in this sense. The loss of a deed, the disappearance of a will, may be accidental. Where rats on board a ship gnawed through a lead pipe, and the sea

water consequently escaped and damaged the cargo, the judges were much divided; but the House of Lords eventually decided that this was a "danger or accident of the seas," the jury having expressly found that there was no negligence on the part of the shipowners (*Hamilton, Fraser, & Co.* v. *Pandorf & Co.*, 1887, 12 App. Cas. 518). So, in Courts of equity, the word "accident" has always been defined as "such an unforeseen event, misfortune, loss, act, or omission, as is not the result of any negligence or misconduct in the party" applying for relief (Story, 78). In criminal law, too, "an effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it" (Stephen, *Dig. of Crim. Law*, art. 210). In all crimes in which any form of deliberate or criminal intention is of the essence of the offence, it is a defence or excuse to prove that the act relied on as constituting the crime was done by accident (*per infortunium*), not due to any default of the accused; unless the act which caused the accident was in itself unlawful, or was done unlawfully or without proper care or caution, having regard to its nature. In cases of unintentional homicide, for instance, persons causing the death of another by misadventure are expressly exempted from punishment (24 & 25 Vict. c. 100, s. 7). But this does not extend to cases where death is due to careless use of firearms or reckless driving (*R.* v. *Salmon*, 1880, 6 Q. B. D. 79; *R.* v. *Fenton*, 1830, Lew. C. C. 179; Stephen, *Dig. Crim. Law*, 5th ed., art. 237; Mayne, *Criminal Law of India*, 1896, pp. 361-364). If the death is by a pure accident, no crime is committed. But if the act which caused the death was one which the accused knew, or ought to have known, to be dangerous to human life, or likely to cause grievous bodily injury, then its commission is culpable negligence, and is not a pure accident.

But the word is constantly used in a wider sense. We call a collision on a railway an accident, whether it is caused by any one's negligence or not. And the word is used in this more extended meaning in the title of Lord Campbell's Fatal Accidents Act, 8 & 9 Vict. c. 93, and throughout the Notice of Accidents Act, 1894, 57 & 58 Vict. c. 28 (see ACCIDENTS, NOTICE OF); while, in policies of assurance against accidents, the word usually covers the results of the assured's own negligence as well as that of other people.

By the Workmen's Compensation Act, 1897, a workman is entitled to compensation when he has received "personal injury by accident arising out of, and in the course of, any employment" to which the Act applies. What is the exact meaning of the word "accident" under this Act is a question which has involved much discussion. All the cases up to April 1905 will be found collected in the arguments and judgments in the case of *Brintons, Ltd.* v. *Turvey*, [1905] A. C. 230. In that case a workman who had been employed in sorting wool died of anthrax, caused by a bacillus passing from the wool into the corner of his eye; and the Court held that it was a case of "injury by accident" within the meaning of the Act. "When some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease"

(*per* Lord Halsbury, L.C., at p. 233). "The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death" (*per* Lord Macnaghten, at p. 234). The reasons, however, given by Lord Robertson for his dissenting judgment deserve careful consideration. Since the decision of the House of Lords in *Brintons, Ltd.* v. *Turvey, supra*, the Court of Appeal has held that a workman, who in the course of his employment was stationed close to an open hatchway, and who was seized with an epileptic fit, and consequently fell into the hold and was injured, was entitled to recover compensation under the Act (*Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K. B. 225). In *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K. B. 232, a workman, whose employment necessitated the handling of white and red lead, gradually accumulated lead in his system, with the ultimate result that he suffered from lead-poisoning, which produced partial paralysis and incapacity for work. Mathew, L.J., was of opinion that this was not an accident within the meaning of the Act. The other two members of the Court expressed no opinion on this point, but Collins, M.R., said: "It appears that an accident must be a mishap from which the element of haphazard is to be eliminated, and the word at the same time is to be treated as being used in its popular and ordinary sense" (p. 236).

Where an employer is indemnified by a policy granted by an assurance company against his liability to compensate a workman for injuries sustained through an accident, the liability of the assurance company depends on the antecedent liability of the employer to his workman; and the word "accident" in such a policy means any injury in respect of which compensation is properly claimed from the employer (*South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402). In that case the Court of Appeal decided that if a tramcar was overturned, and forty persons were injured, there were forty accidents, not one. In *Challis and Others* v. *L. & S.-W. Ry. Co.*, 1905, 93 L. T. 330, where the engine-driver of a train was injured by a stone intentionally thrown at the engine by a boy standing on a bridge over the railway, it was held by the Court of Appeal that the injury was caused by an accident within the meaning of sec. 1 of the Workmen's Compensation Act, 1897.

See "Employers' Liability and Workmen's Compensation," an article in the *Law Magazine and Review* (1904-5), vol. 30, p. 439, and a paper read by Stanley B. Atkinson, Esq., to the Medico-Legal Society (1904-5), vol. 2, p. 10.

Accident Insurance.—There has been a considerable development of this branch of insurance during the last thirty or forty years. Under the form of policy which is most commonly used, the assured or his representative is entitled to certain fixed payments in case he sustains any bodily injury, "caused by violent, accidental, external, and visible means," and resulting in death or disablement within three months of the accident. "Disablement" means that the assured is prevented, wholly or partially, from attending to his ordinary business; it may be either permanent or temporary, total or partial; and these terms are, as a rule, carefully defined in the policy. The amount payable in case of death and the weekly compensation for disablement are fixed by the policy, without any regard to the income or earnings of

the assured; in other words, the contract is not one of indemnity. But the weekly payments continue only so long as the assured is disabled, and the policy usually provides that in no case shall such compensation be payable for more than twenty-six weeks for any one accident. The period covered by the insurance is generally one year, though it may be limited to any period, or confined to a particular journey. At the end of the year the directors are in no way bound to renew the policy; they may continue it or not, at their pleasure (*Simpson* v. *Accidental Death Insurance Co.*, 1857, 2 C. B. N. S. 257; *Stokell* v. *Heywood*, [1897] 1 Ch. 459). The policy must bear a penny stamp (54 & 55 Vict. c. 39, s. 1), except in the case of a policy of insurance authorised by the Friendly Societies Act, 1896, or by the rules of a society or a branch society registered under that Act (59 & 60 Vict. c. 25, s. 33).

The applicant for such a policy is usually required to answer the questions on a printed proposal form, and to sign a declaration at its foot that the answers shall form the basis of the contract, and are true. The policy usually contains a proviso that it was granted on the express condition that the answers given on the proposal form are true. If the applicant employs or permits a third person, even an agent of the company, to write in the answers for him, he will be bound by any misstatement even though innocently made by such third person; and if such misstatement be material the policy will be void. Hence, where the local agent of an insurance company filled up the proposal form, and in so doing inserted untrue statements without the knowledge or authority of the intending insurer, who afterwards signed the proposal form without reading it, it was held that it was the duty of the applicant to read the answers to the questions in the proposal form before signing it, and that he must be taken to have read and adopted them; and, secondly, that in filling in the false answers the agent was acting, not as the agent of the insurance company, but as the agent of the applicant; and that therefore the policy was void (*Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516). So in Scotland, where an intending insurer requested the agent of the company to fill up the proposal form for him, which he did, and the insurer signed it without reading it over, and the policy was granted with the usual conditions—and an answer by the agent to a material question on the form proved to be false in fact, it was held that the agent in filling in the false answer to the question was acting as agent of the insurer, and not of the company, that the insurer must be held to have adopted the answer, and that the policy was void (*Life and Health Assurance Association* v. *Yule*, 1904, 6 F. 437).

What Accidents are within the Policy.—The risk insured against is generally defined with exactness in the conditions of the policy.

1. There must as a rule be some external violence operating directly upon the person of the assured. If the assured's own deliberate act produces as its ordinary result some injury to himself, this is not covered by the policy (*Clidero* v. *Scottish Accident Insurance Co.*, 1892, 10 Rettie (Sc.), 355); but see *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q. B. 750. Thus suicide is not an accident (*Ellinger & Co.* v. *Mutual Life Insurance Co. of New York*, [1904] 1 K. B. 832). But suicide is not to be presumed (*Trew* v. *Railway Passengers Assurance Co.*, 1861, 6 H. & N. 839; 30 L. J. Ex. 317).

2. There is generally a proviso which excludes death or disablement

resulting from any natural disease or internal weakness, or any medical operation rendered necessary by any such disease or weakness. Under this proviso it has been held that the insurer was not liable for death caused by sunstroke (*Sinclair* v. *Maritime Passengers Assurance Co.*, 1861, 3 El. & El. 478; 30 L. J. Q. B. 77).

3. The policy does undoubtedly protect the assured from the consequences both of his own and of other people's negligence. Thus compensation has been recovered in cases where the accident was caused by the assured jumping into or out of railway carriages or omnibuses while in motion. It is usual now, however, for the insurance company to guard itself by a proviso that the policy shall not cover any injury caused by the assured's acting in contravention of the bye-laws of any public company. It is usual also to exclude any accident which happens to the assured while he is under the influence of intoxicating liquor. The meaning of this proviso was discussed in *Mair* v. *Railway Passengers Assurance Co.*, 1877, 37 L. T. 356. But, in all cases not covered by such exceptions, the assured can recover, though his own misconduct or negligence conduced to the accident. Some companies also insert in their policies a clause excluding liability for injuries sustained by the assured "while wilfully (or wantonly) exposing himself to unnecessary danger," or "to obvious risk of injury." This clause has been much discussed in America. In England there is a Nisi Prius ruling in *Shilling* v. *Accidental Death Insurance Co.*, 1858, 1 F. & F. 116, and a division of opinion in *Mair* v. *Railway Passengers Assurance Co.*, 1877, 37 L. T. 356; but only one decision. In the case of *Cornish* v. *Accident Insurance Co.*, 1889, 23 Q. B. D. 453, it was laid down that the exception must not be taken too literally; that some qualification must be put on the words used, otherwise the contract would be rendered practically illusory; but that the clause had the effect of excluding all accidents which arose from the assured exposing himself to risk of injury, if such risk was obvious to him at the time; or would have been obvious to him if he had paid reasonable attention to what he was doing (*ibid.* p. 456).

4. The death or disablement must be the direct result of the accident. As a rule this is a simple issue of fact. But legal questions of some difficulty arise, when two or more causes contribute to produce death or injury to the assured. *E.g.* if a man suffering from a serious illness meets with an accident, and subsequently dies, it may be difficult to determine whether his death was caused by the illness or by the accident. A rough-and-ready method was at one time adopted (or suggested), namely, to decide the question by proximity in point of *time*. If the illness preceded the accident, it was presumed that the illness could not be the cause of death, for the patient lived till the accident happened. If, however, the accident was first in date, and the patient survived it, then the death must be the result of the subsequent disease. But the cause of death cannot be ascertained merely by comparing dates in this way. The rule (if it ever deserved that title) that the proximate cause in point of time was alone to be regarded, is now no longer recognised. The question in every case is, What really caused the death? Which was the *causa causans?* Thus, if an accident brings on, as its natural or very usual result, some form of disease such as hernia or erysipelas, and that hernia or erysipelas causes death, then here clearly the accident directly causes the death, though it preceded the disease in

point of time; the whole train of circumstances constitutes a single cause (*Isitt* v. *The Railway Passengers Assurance Co.*, 1889, 22 Q. B. D. 504). And this is so, although the policy expressly provides that the insurance shall not extend to hernia or erysipelas, or other form of disease. Unless the terms of the policy make it clear that the intention of the parties was otherwise, such an exception will not protect the insurer when these diseases are the direct result of an accident, within the meaning of the policy. The accident is then regarded as the cause of death or disablement, and the interposed disease is merely a link in the chain of circumstances, and not a separate and independent cause (*Fitton* v. *Accidental Death Insurance Co.*, 1864, 17 C. B. N. S. 122; *Smith* v. *The Accident Insurance Co.*, 1870, L. R. 5 Ex. 302). Thus where a signalman saw that a collision was imminent, and the consequent excitement and alarm produced a nervous shock which incapacitated him from work, it was held that this was an accident within the meaning of the policy (*Pugh* v. *L. B. & S. C. Ry. Co.*, [1896] 2 Q. B. 248; and see *Brintons, Ltd.* v. *Turvey*, [1905] A. C. 230; *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K. B. 232, *ante*, p. 88). Again, if a man is afflicted with a dangerous disease, and an accident occurs to him during his illness, and after the accident he dies *of the disease*, then, *ex hypothesi*, the accident is not the cause of death (*Cawley* v. *National Employers' Association*, 1885, 1 C. & E. 597). Thus, where the assured both before and after the accident suffered from Bright's disease, and died from that disease, but the progress of the disease was accelerated by an accidental fall from his dogcart, the Court held that it had not been proved that the assured died from the accident, and gave judgment for the defendants (*M'Kechnie's Trs.* v. *Scottish Accident Assurance Co.*, 1889, 17 Rettie (Sc.) 6). It is now very usual to insert in the policy an express provision exempting the insurer from liability in the case of death or injury resulting from internal disease, *although accelerated by accident*. But it would seem that no such clause is necessary (*ibid.*). So, too, where the assured, whilst crossing and fording a stream, was seized with an epileptic fit and fell into the stream, and was there drowned whilst suffering from the fit, the Court of Appeal held that the death was occasioned by "accidental, external, and visible means," and that the company was liable, although the policy contained a proviso that the insurance should not extend "to an injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease;" for the assured sustained no personal injury which could occasion death except the drowning, which was accidental (*Winspear* v. *Accident Insurance Co.*, 1880, 6 Q. B. D. 42; and see *Reynolds* v. *Accidental Insurance Co.*, 1870, 22 L. T. 820; *Lawrence* v. *Accidental Insurance Co.*, 1881, 7 Q. B. D. 216; and see *Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K. B. 225, *ante*, p. 88). The mischievous act of a third person has been held to be an accident within the meaning of sec. 1 of the Workmen's Compensation Act, 1897 (*Challis and Others* v. *L. & S.-W. Ry. Co.*, [1905] 93 L. T. 330, *ante*, p. 88).

Defences to an Action on the Policy.—As in all other cases of insurance, the assured must make a full disclosure of all material facts. If there be any false statement or misrepresentation, or any suppression of the truth, whether fraudulent or not, in any proposal or application for the policy, or in any claim made under it, the contract is void (see *London Assurance* v. *Mansel*, 1879, 11 Ch. D. 363; *Thomson* v. *Weems and Others*,

1884, 9 App. Cas. 671). The same result will follow in the case of death, if the insurance was really effected by someone who had no insurable interest in the life of the assured (see LIFE INSURANCE—INSURABLE INTEREST); and this whether the policy was made out in the name of the assured or not (*Shilling* v. *Accidental Death Insurance Co.*, 1857, 2 H. & N. 42; 26 L. J. Ex. 266; *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92). Then, it is generally made a condition precedent to any liability on the part of the insurance company, that notice of any accident should be promptly given to them at their head office; and if so, the absence of such notice is a defence to any action on the policy (*In re Williams and Lancashire and Yorkshire Insurance Co.*, 1903, 51 W. R. 222), even though it was impossible to give the required notice (*Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.*, 1885, 1 T. L. R. 495; *Cawley* v. *National Employers' Association*, 1885, 1 C. & E. 597; *Gamble* v. *Accident Assurance Co.*, 1869, Ir. R. 4 C. L. 204; and see *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K. B. 232, which was, however, a case of notice to the employer). But, to produce this result, the giving of such notice must be expressly made a condition precedent to liability (*Stoneham* v. *Ocean Accident Assurance Co.*, 1887, 19 Q. B. D. 237). See CONDITIONS—*Conditions Precedent.* The policy often provides in addition that the company may, if it thinks fit, send its own medical man to attend or visit the assured, or have a post-mortem examination, or require other proof satisfactory to its directors of the cause of death, of the nature of the accident, of the extent of disablement, etc. And compliance with these provisions may also be made a condition precedent to liability. But it must be remembered that "proof satisfactory to the directors" in such a provision means "proof which ought to be satisfactory to the directors" (*Braunstein* v. *Accidental Death Insurance Co.*, 1861, 31 L. J. Q. B. 17); and that the assured or his representative is not bound to forward any such proof after the company has once definitely repudiated all liability (*Shiells* v. *Scottish Assurance Corporation*, 1889, 16 Rettie (Sc.) 1014). Lastly, the policy usually contains a clause entitling the company, if it thinks fit, to have any dispute referred to arbitration; and if the clause be drawn in such a way that no cause of action accrues till the amount payable has been determined by arbitration, then such a clause is a condition precedent, and will afford an answer to any action (*Caledonian Assurance Co.* v. *Gilmour*, [1892] App. Cas. 85). In any arbitration under such a clause, the arbitrators or umpire have now full power to state, in the form of a special case, any question of law arising in the course of the reference (52 & 53 Vict. c. 49, ss. 7, 19; *Isitt* v. *Railway Passengers Assurance Co.*, 1889, 22 Q. B. D. 504). See ARBITRATION.

Employers' Liability, etc.—There is another form of accident insurance which has become common since the passing of the Employers' Liability Act, 1880, and the Workmen's Compensation Acts of 1897 and 1900. Under this form of insurance the insurer undertakes to indemnify the assured against any liability which he may incur for damages or costs, in case anyone in his employ should be accidentally injured and should claim compensation from his employer. The premium payable is usually calculated in the form of a percentage on the total amount of wages paid by the employer, but on various scales, according to the risks of the particular trade which he carries on. These policies also must bear a penny stamp (62 & 63 Vict. c. 9, s. 11, overruling the decision in

Lancashire Insurance Co. v. *Commissioners of Inland Revenue*, [1899] 1 Q. B. 353). So, too, policies are now issued to the owners of public vehicles, indemnifying them against all claims by persons who may be injured by any accident when riding in, or alighting from, such vehicle. The owner of any private carriage may also be indemnified against the carelessness of his coachman, but not against negligence of his own.

All these are contracts of indemnity, and are regulated by the same rules as fire and marine insurance (see FIRE and MARINE INSURANCE); the principle of contribution is applicable; and the liability of the insurer depends on the antecedent liability of the assured. Unless the person injured has a valid claim for compensation against the assured, either at common law or under the statute, the assured has no insurable interest and no claim under the policy. The word "accident" in such a policy means "any injury in respect of which compensation is properly claimed from the plaintiffs" (*South Staffordshire Tramway Co.* v. *Sickness and Accident Assurance Co.*, [1891] 1 Q. B. 402). It is usual to insert in policies of assurance against employers' liability clauses protecting the company against any change in the trade of the employer or his mode of conducting it, and also a proviso obliging him to defend any action brought against him by his workman, if the company requires him so to do, and forbidding his compromising the action or paying any compensation to the workman without the consent of the directors. The policy also frequently requires the employer to give immediate notice to the company at their head office of any accident causing injury to a workman in his employ, and stipulates that time shall be of the essence of such condition. Notice by telephone to the person who introduced the employer to the company has been held not to be notice to the company within the meaning of this condition (*In re Williams and Lancashire and Yorkshire Accident Insurance Co.*, 1903, 51 W. R. 222). See EMPLOYERS' LIABILITY and WORKMEN'S COMPENSATION.

Accidents, Notice of.—By the Notice of Accidents Act, 1894, 57 & 58 Vict. c. 28, the proprietors of any railway, tramway, gasworks, canal, harbour, bridge, pier, or other public undertaking, are bound to give notice to the Board of Trade of any accident which causes either the death of any workman in their employ, or prevents his working as usual on any one of the next three working days; and the Board may thereupon direct an investigation to be held into the causes and the circumstances of such accident.

If any workman seeks to recover compensation from his employer under the provisions of the Workmen's Compensation Act, 1897, he must give to his employer notice of the accident "as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured. . . . Provided always that the want of, or any defect or inaccuracy in, such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause." Such notice must give the name and address of the person injured; it must state in ordinary language the cause of the injury and the date at which it was sustained. It must be served on the employer, or one of the employers, or sent by a registered letter properly addressed to him,

at his residence or place of business, or, in the case of a company, at any office of the company (60 & 61 Vict. c. 37, s. 2). To bring a case within the Act, however, there must be an injury by an accident of which notice can be given so as to satisfy the requirements of sec. 2, subs. (i); hence a workman, who in the course of his employment gradually accumulated lead in his system which resulted in lead-poisoning, was not allowed to recover compensation, because it was not possible to indicate a time at which there was an accident which caused the injury (*Steel* v. *Cammell, Laird & Co.*, [1905] 2 K. B. 232). See further, EMPLOYERS' LIABILITY and WORKMEN'S COMPENSATION.

Accommodation Bill.—An accommodation party to a bill of exchange is a person who has signed the bill as drawer, acceptor, or indorser, without receiving value therefor, and *for the purpose of lending his name to some other person* (Bills of Exchange Act, 1882, s. 28 (1)). (The sections cited below are from this Act.) The circumstance that a party has in fact received no value for the bill does not of itself make him an accommodation party (see Byles on *Bills*, 16th ed., p. 155). A bill to which there are one or more accommodation parties is an accommodation bill. The name is sometimes restricted to the commonest example of such bills, in which the acceptor signs for the accommodation of the drawer. It is presumed, in the absence of evidence to the contrary, that the acceptor is the person ultimately liable to pay the bill, and after him the drawer and the indorsers in the order of their indorsements; but evidence is admissible to show that any party, as between himself and a later party, or that the acceptor, as between himself and the drawer, is not so liable, and that as between such parties the bill is an accommodation bill. It makes no difference that a commission, or other consideration, has been paid to the accommodation party for the use of his name (*Oriental Corporation* v. *Overend, Gurney, & Co.*, 1871-74, L. R. 7 Ch. 142; 7 H. L. 348), if he has not received value for undertaking to *pay the bill*. An accommodation party ceases to be such if after becoming a party he receives value for the bill, so that, as between himself and the party accommodated, the latter is not ultimately liable to pay it (*Burdon* v. *Benton*, 1847, 9 Q. B. 843; 72 R. R. 469—there a cross acceptance was subsequently given).

An accommodation party is liable on the bill to a holder for value, whether the latter knew him to be such or not (s. 28 (2)). But since he is, in fact, only a surety for the party accommodated, the holder of the bill, after having notice that this is the case, is bound by the ordinary rules, as to giving time to the principal debtor, and as to surrendering securities, etc., which spring from the relationship of creditor, debtor, and surety (*Oriental Corporation* v. *Overend, Gurney, & Co., supra; Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586). See PRINCIPAL AND SURETY.

He can avail himself of any defence which is available for the party accommodated, for instance, set-off for a debt due to the latter from the plaintiff (*Bechervaise* v. *Lewis*, 1872, L. R. 7 C. P. 372). Payment by the party accommodated in due course discharges the bill (s. 59 (3)), so that, if it is afterwards reissued, the party accommodated cannot be sued by the holder (*Cook* v. *Lister*, 1863, 32 L. J. C. P. 121; *Jewell* v. *Parr*, 1853, 13 C. B. 909. See Chalmers' *Bills of Exchange*, 6th ed., p. 208).

[A holder for value who takes an accommodation bill in good faith,

with no drawer's name, is liable on the bill if the party from whom he takes it has in fact no authority, or only a limited authority, to insert the name of a drawer (*Watkins* v. *Lamb*, 1901, 85 L. T. 483).]

If an overdue bill of exchange is negotiated, it is negotiated subject to any defect of title (or equity attaching to the bill) affecting it at its maturity (s. 36 (2)): "After a long controversy, it now seems settled that mere absence of consideration is not an equity which attaches to a bill (*Sturtevant* v. *Ford*, 1842, 4 Man. & G. 101; 61 R. R. 483), but that if there be an agreement, express or implied, not to negotiate an accommodation bill after maturity, the agreement constitutes an equity attaching to it" (*Parr* v. *Jewell*, 1855, 16 C. B. 684, quoted from Chalmers, 6th ed., p. 119; and see Byles, 16th ed., p. 200).

Presentation for payment or acceptance and notice of dishonour are usually dispensed with, where it is sought to charge an accommodation party to a bill, namely, *presentation*, where he has no reason to believe or expect that the bill would be paid if presented, and *notice* without this condition—as regards the drawer, where the drawer or acceptor is not bound as between himself and the drawer to accept or pay the bill; as regards an indorser, where the bill was accepted or made for the accommodation of that indorser (ss. 46 (2) (*c*) (*d*); 50 (2) (*c*) (*d*)).

The party accommodated is bound to indemnify the accommodation party against his liability upon the bill, and this extends to the costs of actions brought against the latter upon the bill and reasonably defended (*Stratton* v. *Matthews*, 1848, 3 Ex. Rep. 48; *Hammond* v. *Bussey*, 1887, 20 Q. B. D. 79). It has been decided that where an indorser, who was an accommodation party, paid the bill without having received due notice of dishonour, he could not recover from the party accommodated (*Sleigh* v. *Sleigh*, 1850, 5 Ex. Rep. 514), but this case has been questioned (see the judgment of Thesiger, L.J., in *Ex parte Bishop*, 1880, 15 Ch. D. 400). In any case it is only where the accommodation party has full knowledge that he cannot be compelled to pay the bill, that he is barred from recovering on the implied contract to indemnify (*Sleigh* v. *Sleigh*, *supra*).

[As to who is to be deemed a holder for value to the extent of his lien under sec. 27 (3), see *Redfern* v. *Rosenthall*, 1902, 86 L. T. 855.

In *Walters* v. *Neary*, 1904, 20 T. L. R. 555, the drawer of an accommodation bill, who had omitted to endorse it, and had handed it to the accommodation party, was ordered, in an action by a transferee, to endorse the bill as holder].

Accommodation Works.—These works are of various kinds, but "accommodation works" in their general legal acceptation refer to works required to be executed by the company or party authorised to construct a railway.

The exact nature of these works is fully set out in the 68th section of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, which is as follows:—

"And with respect to works for the accommodation of lands adjoining the railway—it is enacted as follows: The company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway: (that is to say,)

"Such and so many convenient gates, bridges, arches, culverts, and

passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof:

"Also sufficient posts, rails, hedges, ditches, mounds, or other fences for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such land from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway, together with all necessary gates made to open towards such adjoining lands, and not towards the railway, and all necessary stiles; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be:

"Also all necessary arches, tunnels, culverts, drains or other passages, either over or under or by the sides of the railway, of such dimensions as will be sufficient at all times to convey the water as clearly from the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be; and such works shall be made from time to time as the railway works proceed:

"Also proper watering places for cattle where by reason of the railway the cattle of any person occupying any lands lying near thereto shall be deprived of access to their former watering places; and such watering places shall be so made as to be at all times as sufficiently supplied with water as theretofore, and as if the railway had not been made, or as nearly so as may be; and the company shall make all necessary watercourses and drains for the purpose of conveying water to the said watering places:

"Provided always, that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them."

In the interpretation placed upon this section, "lands adjoining the railway" do not include anything beneath the surface (*R.* v. *Fisher*, 1862, 32 L. J. M. C. 12; 3 B. & S. 191), and the company's only liability as regards "fences" is towards the owners or occupiers of an adjoining close (*Ricketts* v. *East & West India Dock & Birmingham Ry. Co.*, 1852, 12 C. B. 160; 21 L. J. C. P. 201). The company are under no liability to maintain fences sufficient to keep cattle off the line under all circumstances, but are bound to use reasonable care towards their passengers (*Buxton* v. *N.-E. Ry. Co.*, 1868, L. R. 3 Q. B. 549). In the proviso the liability of the railway company to make such accommodation works is not released towards the person, whether owner or occupier, who has not agreed to receive compensation, or to whom the company has not paid compensation instead of making the accommodation works. For instance, payment of compensation to the landlord does not release them from their statutory liability to the tenant to make and maintain fences (*Corry* v. *G. W. Ry. Co.*, 1881, 7 Q. B. D. 322; 50 L. J. Q. B. 386; 44 L. T. 701; 29 W. R. 623).

[Where a railway company entered into an agreement with a land-

owner to allow him a level crossing for a tramway which their line cut across, the easement being "for the accommodation of the owners and occupiers for the time being of the lands adjoining the railway," it was held that the landowner's successor in title could not use this tramway for the conveyance of goods and traffic brought on to his lands from other places (*G. W. Ry. Co.* v. *Talbot*, [1902] 2 Ch. 759).]

In addition to the foregoing provision, sec. 69 provides for differences as to accommodation works being settled by justices; and in the event of failure by the company to commence such works, sec. 70 gives the party aggrieved power to execute such works himself, the reasonable expenses thereof to be repaid by the company.

Any owner or occupier of lands affected by the railway may make such further works as he may think necessary for the commodious use of his land if agreed to by the company, or, in case of difference, as shall be authorised by two justices (s. 71). [The justices can only take into consideration the state of things existing at the construction of the works, and not a state of things which has arisen in consequence of an altered state of the property (*Rhonnda & Swansea Ry.* v. *Talbot*, [1897] 2 Ch. 131).] Sec. 72 provides that all such accommodation works shall be constructed under the superintendence of the company's engineer, if they so desire. And sec. 73 limits the period within which the company may be required to make any further or additional accommodation works to five years from the completion of the works and the opening of the railway for public use (*Colley* v. *L. & N.-W. Ry. Co. & G. W. Ry. Co.*, 1880, 5 Ex. D. 277; 49 L. J. Ex. 575; 42 L. T. 807; 29 W. R. 16).

In addition to the foregoing provisions, the owners and occupiers of lands, and any other persons whose right of way shall be affected (including their respective servants), may cross the railway for the purpose of occupying the lands or the exercise of their rights, until the company have made the accommodation works (s. 74).

Further, there is a penalty imposed by sec. 75 on persons omitting to fasten gates; and lastly, there is a power given to owners and occupiers, and other persons to make (subject to certain restrictions and conditions) private branch railways. See BRANCH RAILWAYS.

PRECEDENT.

DEED OF AGREEMENT by a Railway Company to execute WORKS *for the* ACCOMMODATION *of the Owner of Lands adjoining the Railway.*

THIS INDENTURE made the day of , 18 , BETWEEN the X. and Y. Railway Company of the one part, and A. B., of &c. of the other part: WHEREAS the owner is seised of or otherwise entitled for an estate in fee simple in possession to (amongst other hereditaments) the several pieces of land and hereditaments described in the schedule hereunder written, and which being required by the company for the purposes of their works were recently agreed to be purchased by them free

Parties.

Recitals; of agreement for sale of lands to company:

of conveyance to company; from incumbrances at the price of £ : AND WHEREAS by an indenture bearing even date with, but to be executed after, this agreement the said pieces of land and premises are intended to be conveyed unto and to the use of the company their successors and assigns: AND WHEREAS upon the treaty for the said purchase it was agreed that the company should make the payments and execute the several accommodation and other works hereinafter mentioned respectively, and should enter into the stipulations hereinafter contained and on their part to be observed and performed: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, and the company do hereby for themselves, their successors and assigns (so far as relates to the stipulations on their part to be observed and performed) covenant with the owner in manner following, that is to say:

of agreement to execute works, &c.

Interpretation clause. 1. In this agreement the term "owner" includes the owner and his heirs and assigns, and the term "the company" includes the X. and Y. Railway Company and their successors and assigns.

To make and maintain roads, gates and culverts. 2. The company shall previously to the opening for traffic of the said intended railway or any part thereof, make and for ever after the making thereof, maintain fit for the convenient passage thereover respectively of agricultural waggons and carriages, such roadways or paths each of the width of ten feet at the least, with such culverts and works thereunder respectively as are next hereinafter mentioned or referred to [*describe these works in detail*]: And also shall at their own cost make, and for ever maintain in good and sufficient repair and condition, suitable gates, each of sufficient width for the passage of agricultural waggons and carriages, over or upon all the several roadways or paths hereinbefore mentioned: and also shall at the like cost make, and in like manner maintain in good and sufficient repair, culverts, tunnels, and other necessary works under the said several roadways or paths, so as that the same respectively shall not in any way interfere with, hinder or obstruct the free passage of water through the said several drains or ditches over which the same roadways or paths shall respectively pass as aforesaid.

To make and maintain drains. 3. The company shall make, and for ever after the making thereof, maintain and keep open two main drains to be made parallel with and adjoining to the said intended railway, the one on the eastern and the other on the western side thereof, so that an effectual watercourse may be maintained and continued along the said intended railway for such distance as the same shall pass through or adjoin upon lands belonging to the owners.

To make and maintain tunnels. 4. The company shall make, and for ever after the making thereof respectively maintain, and keep in good repair for the purpose of carrying off the water from such of the lands lying adjacent to the said pieces or parcels of land described or referred to in the said schedule to these presents, as are situate on the eastern side of the said intended railway, a circular tunnel under

the same railway of the width or diameter throughout of feet at the least, to run between the pieces of land first and secondly described in the said schedule, and to be in the same position and direction as nearly as circumstances will permit as is the drain or ditch which now separates the same pieces of land respectively the one from the other, which position and direction are delineated in the plan drawn in the margin of these presents by a line or mark coloured blue.

To make and maintain crossings.

5. The company shall make, and for ever after the making thereof, respectively repair and maintain fit for use and suitable for the passage thereover respectively of agricultural waggons and carriages, the several passages or crossings, each of the width of ten feet, over or across the said intended railway and the works thereof next hereinafter mentioned (that is to say,) First, one such passage or crossing over or upon the piece of land firstly described in the schedule hereunder written, at the northern end thereof and immediately adjoining to the station which is intended to be erected and built by the said company on land lying on the eastern side of the same piece of land, which said passage or crossing is delineated in the said plan drawn in the margin of these presents by a line coloured red [*describe in a similar manner the other crossings*].

The company not compellable to make further accommodation works.

6. The company shall not, by reason of the purchase by them of the pieces of land and hereditaments respectively described in the said schedule hereunder written, be liable or compellable by virtue of the Railways Clauses Consolidation Act, 1845, or otherwise howsoever, to make, construct, or erect for the accommodation of the owner any works whatsoever, other than those hereinbefore agreed to be made by them.

How works to be completed.

7. All the works hereinbefore agreed to be made by the company shall be executed by them and at their own cost, to the satisfaction of Mr. , of &c., or other the surveyor for the time being of the owner, and shall be completed within months from the date of this agreement.

AS WITNESS, &c.

THE SCHEDULE ABOVE REFERRED TO.

Accomplice.—A term applied to every *particeps criminis, i.e.* to every person who is in any other way associated with another person in committing or attempting to commit any criminal offence, whether treason, felony, or misdemeanor (Fost., 2nd ed., 341; 3 Stephen, *Hist. Crim. Law*, 229; *R.* v. *Farler*, 1837, 8 Car. & P. 106; Hawk., P. C., bk. ii. c. 37, s. 7; Mayne, *Criminal Law of India*, 1896, 429-457; and see ABETTOR; ACCESSORY). The term is in practice used chiefly with reference to evidence in criminal cases. An accomplice has always been held to be an admissible witness, at any stage of the prosecution, either

for or against his associates in the joint offence, in spite of his interest in securing a conviction in order to obtain pardon or mitigation of punishment (Hawk., P. C., bk. ii. c. 46, ss. 97-100; *R.* v. *Dodd*, 1777, 1 Leach, C. C. 155). It was, however, held that the accomplice, if actually convicted or attainted, could not give evidence (Hawk. s. 101); but this disability was taken away as to convicted persons by 6 & 7 Vict. c. 85, s. 1, except perhaps in a case of a person under sentence of death (*R.* v. *Webb*, 1867, 11 Cox C. C. 113): and as attainder was abolished by the Forfeitures Act, 1870 (33 & 34 Vict. c. 23, s. 1), this exception seems to be now without justification. Where an accomplice is to be called for the Crown, on a promise of pardon or of immunity from prosecution, or of mitigation of punishment, it is the practice either (1) not to include him in the indictment against his associates; or (2) to take his plea of guilty, or otherwise withdraw his case from the jury before calling him (*Winsor* v. *R.*, 1866, L. R. 1 Q. B. 289, 390); (3) to offer no evidence against him on the indictment, and take an acquittal before calling him (*R.* v. *Owen*, 1839, 9 Car. & P. 83); or (4) to enter a *nolle prosequi* (*R.* v. *O'Connor*, 1843, 4 St. Tri. N. S. 936). At common law an accomplice cannot be called for the defence of an associate in crime unless (1) an order for separate trials has been made (*R.* v. *Bradlaugh*, 1883, 15 Cox C. C. 217; *R.* v. *Payne*, 1872, L. R. 1 C. C. R. 349; *Allen* v. *Allen*, [1894] P. 248, 253); or (2) the accomplice has first pleaded guilty or been acquitted for want of evidence. But under the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 1, the accomplice can, with his consent, be called for the defence, and it would seem that he would be as free to exculpate as he is to inculpate a co-defendant (*R.* v. *Hadwen*, [1902] 2 K. B. 882, 888). The wife of an accomplice is subject to the same rules as her husband (*R.* v. *Thompson*, 1872, L. R. 1 C. C. R. 377). An accomplice who satisfies the conditions on which he is allowed to turn King's evidence, usually receives a pardon; but until it is given has no legal right to exemption from punishment (*R.* v. *Garside*, 1834, 2 Ad. & E. 266; 3 Russ. on *Crimes*, 6th ed., 642). It is well established practice, but not a rule of strict law, to direct the jury to acquit in cases where the case for the Crown rests on the evidence of an accomplice, unless he is corroborated by independent evidence as to some material fact implicating the accused in the commission of the offence charged (*R.* v. *Mullins*, 1848, 7 St. Tri. N. S. 1110; *R.* v. *Stubbs*, 1855, 25 L. J. M. C. 16; *R.* v. *Boyes*, 1861, 30 L. J. Q. B. 301; *R.* v. *Gallagher*, 1883, 15 Cox C. C. 291; *In re Meunier*, [1894] 2 Q. B. 415, and see other decisions collected and discussed in 3 Russ. on *Crimes*, 6th ed., 642-653; Arch. Cr. Pl., 23rd ed., 390).

Accord and Satisfaction is a defence, whether the cause of action arise out of contract or tort (see *Boosey* v. *Wood*, 1865, 3 H. & C. 484, where it was pleaded to an action for libel). As the name indicates, it is constituted by the agreement of the claimant to accept, and of the debtor to pay, or do, something in satisfaction of the cause of action—this is the *accord;* and of the actual payment or execution of the thing agreed upon—this is the *satisfaction.* The reports contain a large number of decisions relative to this defence, many of which are obsolete, now that equity and law are administered together. The following points affecting the substance of the law are still of importance:—

1. There must be satisfaction as well as accord. In other words, what is promised in substitution for the cause of action to be satisfied must be actually rendered (*Cumber* v. *Wane*, 1718, 1 Stra. 426). It was formerly held as a deduction from this rule that a fresh promise could not operate as a discharge, but "the rational distinction seems to be, that if the *promise* be received in satisfaction, it is a good satisfaction, but if the *performance*, not the *promise*, is intended to operate in satisfaction, there will be no satisfaction without performance" (1 Smith's L. C., 11th ed., p. 349), and this is the modern rule (*Flockton* v. *Hall*, 1849, 14 Q. B. 380; *Evans* v. *Powis*, 1847, 1 Ex. Rep. 601; 74 R. R. 777; *Edwards* v. *Hancher*, 1875, 1 C. P. D. 111).

2. "Payment of a lesser sum on the day (it would, of course, be the same after the day), in satisfaction of a greater, cannot be any satisfaction for the whole;" *per* Lord Selborne in *Foakes* v. *Beer*, 1884, 9 App. Cas. 605, at p. 612, where this rule, known as the "rule in *Cumber* v. *Wane*," which had previously been much criticised, was upheld and applied. If the cause of action is for an unascertained sum or for a disputed debt, the rule does not apply, and an agreement to accept a sum certain, smaller than the amount claimed in satisfaction, would be binding (*Wilkinson* v. *Byers*, 1834, 1 Ad. & E. 106; and *Miles* v. *New Zealand Co.*, 1886, 32 Ch. D. 266). See COMPROMISE.

The reason assigned in modern times for the rule is, that a promise to waive the unpaid part of the debt is *nudum pactum*, because it is made without consideration. It follows that the promise or performance of something different from, not being merely a part of, what would have been due under the obligation discharged by the accord and satisfaction, is binding, for the Courts will not consider the adequacy of the consideration for a contract (*Curlewis* v. *Clark*, 1849, 3 Ex. Rep. 375; 77 R. R. 651). "The gift of a horse, hawk, or robe, etc., in satisfaction, is good; for it shall be intended that a horse, hawk, robe, etc., might be more beneficial to the plaintiff, in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction" (*Pinnell's Case*, 44 Eliz., 5 Co. Rep. 117*a*). So the agreement of a number of creditors with the debtor that each will take a composition for his debt (*Good* v. *Cheeseman*, 1831, 2 Barn. & Adol. 328; 36 R. R. 574; *Slater* v. *Jones*, 1873, L. R. 8 Ex. 186; [see further, *Dane* v. *Mortgage Insurance Corporation*, [1894] 1 Q. B. 54]), will, if given or made, and agreed to be taken or accepted, as satisfaction, be effective to discharge their several debts; and the contract of one partner to discharge the debt of his firm, if his sole liability has been accepted by the creditor, is a defence to an action by the creditor against the other partners (*Thompson* v. *Percival*, 1834, 5 Barn. & Adol. 925; 53 R. R. 187). The most important example in practice, of accord and satisfaction, is the payment of a smaller sum by a negotiable instrument. This will be effective (*Sibree* v. *Tripp*, 1846, 15 Mee. & W. 23; *Bidder* v. *Bridges*, 1887, 37 Ch. D. 406) if the bill or note is actually given as satisfaction, and accepted as such. If (as in *Day* v. *M'Lea*, 1889, 22 Q. B. D. 610) a cheque is sent by the debtor "in full of all demands," but is kept and applied by the creditor "on account," the balance of the debt is recoverable.

Where an actual agreement to take a smaller sum is not binding, under "the rule in *Cumber* v. *Wane*," *supra*, it follows that a full receipt signed by the creditor, which is merely evidence of such an agreement,

and, not being a deed, does not operate as an estoppel against the creditor, carries the matter no further (*Foster* v. *Dawber*, 1851, 6 Ex. Rep. 839). So, an account stated (*q.v.*) of ascertained, overdue, and undisputed amount, showing a smaller sum to be due than the true balance, is not an accord and satisfaction for the difference (*Perry* v. *Attwood*, 1856, 6 El. & Bl. 691), but it will be such if any of the items are not of the character described (*Callander* v. *Howard*, 1850, 10 C. B. 290).

3. A debt due upon a bill of exchange or promissory note can now be discharged by an absolute and unconditional renunciation of his rights by the holder, if the renunciation is in writing, or the bill or note is delivered to the acceptor or maker (Bill of Exchange Act, 1882, ss. 62 and 89).

4. Accord and satisfaction of a debt by a third person will release the debtor, if made on his behalf, and ratified by him either before it is made (*Simpson* v. *Eggington*, 1855, 10 Ex. Rep. 845), or subsequently before the transaction is rescinded by the third person (*Walter* v. *James*, 1871, L. R. 6 Ex. 124). It has been suggested that the satisfaction may be effected without the ratification (see *per* Willes, J., in *Cook* v. *Lister*, 1863, 13 C. B. N. S., at p. 594; and Pollock on *Contracts*, 7th ed., p. 470), but the law appears to be otherwise (see 1 Smith's L.C., 11th ed., p. 351). Possibly, in the absence of a repudiation of the act of the third party by the debtor, the ratification should be presumed (*Cook* v. *Lister*, *supra*; *London and County Bank* v. *London and River Plate Bank*, 1888, 21 Q. B. D. 535). "In the absence of evidence to the contrary, we may presume that a person accepted an offer which was for his benefit" (*per* Mellish, L.J., in *Ex parte Lambton*, 1875, L. R. 10 Ch., at p. 416). As to an agreement to discharge the debtor and substitute a third person, see NOVATION.

5. An accord, though not under seal, or even in writing, and satisfaction is a defence to an action for breach of covenant (Judicature Act, 1873, s. 24; *Steeds* v. *Steeds*, 1889, 22 Q. B. D. 537).

6. Accord with, and satisfaction of, one of several joint creditors afforded a defence against all, without proof that he had authority to accept it on behalf of his co-creditors (*Wallace* v. *Kelsall*, 1840, 7 Mee. & W. 264; 56 R. R. 707), at law; but in equity, the rule of which now prevails, if the creditors were interested as tenants in common (which, in the absence of evidence, is presumed to be the case, see TENANCY IN COMMON), it operates only to satisfy the share in the debt of the creditor with whom the accord is made (*Steeds* v. *Steeds*, 1889, 22 Q. B. D. 537). Accord and satisfaction made by one of several debtors, whether they be jointly or severally liable, discharges the debt as against all (*Nicholson* v. *Revill*, 1836, 4 Ad. & E. 675; 43 R. R. 460).

7. Until *satisfaction* is made, the original cause of action is unaffected by the *accord*, and may therefore become barred by the Statutes of Limitation (*Reeves* v. *Hearne*, 1836, 1 Mee. & W. 323). On the other hand, when the accord and satisfaction are complete, the original cause of action is determined. So that, for example, the creditor can have no claim for unforeseen danger arising out of it (*Nicklin* v. *Williams*, 1854, 10 Ex. Rep. 259).

8. The accord need not be made or acknowledged in writing whether its subject-matter fall within the Statute of Frauds or not (*Lavery* v. *Turley*, 1860, 6 H. & N. 239).

9. The proper method of discharging a cause of action, where no fresh consideration is to be given, is by a release under seal. See RELEASE.

10. The defence of accord and satisfaction, and the rules stated above, are appropriate only to causes of action. "It is competent for both parties to an *executory* contract (see CONTRACT), by mutual agreement, without any satisfaction, to discharge the obligation of a contract" (*per* Parke, B., in *Foster* v. *Dawber*, 1851, 6 Ex. Rep. 839; *Goss* v. *Lord Nugent*, 1833, 5 Barn. & Adol. 65; 39 R. R. 392), the release of each party by the other from the obligation remaining to be performed by him affording the consideration for the agreement.

Account, Action of.—An action lay at common law against a bailiff or receiver, or against a merchant at the suit of a merchant in respect of dealings between them as merchants, for not rendering a reasonable account of profits. By the statute, 4 Anne, c. 16, s. 27, an action of account might be brought by one joint-tenant or tenant in common against the other, as bailiff, for receiving more than his just share or proportion of the rents and profits of the land (*Henderson* v. *Eason*, 1851, 17 Q. B. 701). But in the face of the extensive jurisdiction of the Courts of equity in all matters of account, these common law actions became practically obsolete. And now, in either Division of the High Court (*York* v. *Stowers*, W. N. 1883, p. 174), a plaintiff may indorse his writ with a claim for an account (Order 3, r. 8), and apply for an order under Order 15, r. 1. The application for such order may be made at any time after the time for entering an appearance has expired, whether the defendant has appeared or not. It is open to the defendant, on the hearing of such application, to raise any preliminary point; for instance, he may deny that the plaintiff is a person to whom he is bound to render any account, or may assert that he has already fully accounted. But unless the defendant can show that there is some such preliminary question to be tried, the account will be taken, either by a master or a district registrar (*In re Bowen*, 1882, 20 Ch. D. 538), or by a special or official referee under either sec. 13 or 14 of the Arbitration Act, 1889 (*Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196). It will be taken as a rule in the manner prescribed in rules 3 to 9 of Order 33; but see *In re Taylor*, 1890, 44 Ch. D. 128; and *Seton*, vol. ii. ch. 43, 6th ed., pp. 1352-1379. And where no claim for an account is indorsed on the writ, still, at any stage of the proceedings, in any cause or matter, the Court or a judge may direct any necessary accounts to be taken, notwithstanding that there may be some further relief sought for, or some special issue still to be tried (Order 33, r. 2). The Court or a judge will also order that the balance, if any, found to be due on taking such accounts be paid to the plaintiff. And as a rule the order will be that such payment be made in English money; otherwise it cannot be enforced by the ordinary writs of execution (*per* Lindley, M.R., in *Manners* v. *Pearson & Son*, [1898] 1 Ch., at p. 587). See ACCOUNTS AND INQUIRIES.

Account, Audit of.—See AUDITOR.

Account Books.—See BANKRUPTCY.

Account Current.—See BANKER AND CUSTOMER.

Account Duty.—The name popularly given to the duty established by the Customs and Inland Revenue Act, 1881, s. 38, which was amended by the Customs and Inland Revenue Act, 1889, s. 11. Account duty, as such, will practically become obsolete, by reason of the provision in the Finance Act, 1894, s. 1, and 1st sched. s. 2, that that duty shall not be levied in respect of property chargeable with estate duty. But as the account duty charge was incorporated and extended in the Finance Acts (see secs. 2 (1) (*c*) and 3 of the Finance Act, 1894, and also 11 (1) of the Finance Act, 1900), the earlier provisions and decisions thereon remain of permanent value, while the decisions upon the incorporating enactment generally affect the account duty (in cases where it is still payable), and they are referred to in this article. Account duty was imposed to subject to stamp duty personal property passing on death by way of *donatio mortis causâ*, joint investment, or voluntary settlement, or under a policy of insurance kept up for a donee, or passing by a voluntary disposition, *inter vivos*, within a certain time from death, and was aimed at preventing certain methods of escaping payment of death duty.

By the Act of 1881, s. 38 (1), stamp duties at the like rates as are by this Act charged on affidavits and inventories, shall be charged and paid on accounts delivered of the personal or moveable property, to be included therein according to the value thereof. The rates are enacted by sec. 27:—

Where the estate is above £100 and not above £500:	Duty rate of £1 for every £50, and for any fractional part of £50.
Where the estate is above £500 and not above £1000:	Duty rate of £1, 5s. for every £50, and for any fractional part of £50.
Where the estate is above £1000:	Duty rate of £3 for every sum of £100, and for any fractional part of £100.

Interest upon duty is chargeable at the rate of 3 per cent. per annum, under the Finance Act, 1896, s. 18 (2).

Sec. 26 provides that these stamp duties shall be under the management of the Commissioners of Inland Revenue, who shall have all powers for their collection and recovery vested in them for the collection and recovery of any stamp duties.

The property charged is described in sec. 38 of the 1881 Act, as amended by sec. 11 of the 1889 Act, and the combined sections run as follows:—

(*a*) "Any property taken as a *donatio mortis causâ* (see DONATIO MORTIS CAUSA) made by any person dying on or after the 1st June 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift, *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made [*three months* by Act of 1881, now by Act of 1889] *twelve* months before the death of the deceased;" [added by the Act of 1889] "and the said description of property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

(*b*) "Any property which a person dying on or after such day, having been absolutely entitled (see ABSOLUTELY ENTITLED) thereto, has voluntarily caused or may voluntarily cause to be transferred to or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person;" [by the Act of 1889] this description of property is to be construed as if the expression "to be transferred to or vested in himself and any other person," included also any purchase or investment effected by the person who was absolutely entitled to the property either by himself alone, or in concert, or by arrangement with any other person.

(*c*) "Any property passing under any past or future voluntary settlement made by any person dying on or after such day, by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved, either expressly or by implication, to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property; [by the Act of 1889] this description of property is to be construed as if the expression 'voluntary settlement' included any trust, whether expressed in writing or otherwise, in favour of a volunteer; and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression 'such property,' wherever the same occurs, included the proceeds of sale thereof.

Sec. 11 of the Act of 1889 further provides that the charge under sec. 38 shall extend to money received under a policy of assurance effected by any person dying on or after the 1st June 1889 on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

Under sec. 38 (3), if stamp duty has been previously paid on a voluntary settlement, the amount of such duty is to be returned to a person delivering an account duly stamped, but this relaxation of duty has been abolished, after the 1st June 1889, by the 1889 Act.

No account is required, nor is duty payable, where the subject of the gift or settlement is not above £100, for the reason that the stamp duties charged on affidavits and inventories were payable only in respect of estates and effects above that value; and under sec. 41, where account duty has been paid, the legacy and succession duties of £1 per centum imposed by the Stamp Act, 1815, and by the Succession Duty Act, 1853, are not payable.

Under sec. 39, any person who in any capacity acquires possession or assumes the management of any property comprehensible under an account, shall, on retaining or disposing of the property, and in any case within six calendar months from the deceased's death, deliver to the Commissioners of Inland Revenue an account of such property, duly stamped, and (s. 40) on neglect by any person required to deliver an account, he shall be liable to pay double duty.

It should be added that if the property included in the account

exceeds in value £10,000, and the deceased dies before 1st June 1896, temporary estate duty is chargeable thereon under sec. 5 of the Customs and Inland Revenue Act, 1889.

Forms of account can be obtained from the Estate Duty Office, Somerset House, and the Estate Duty Office, Dublin or Edinburgh, or any Inland Revenue office. The account, when filled up, must be verified on oath before any officer authorised by the Commissioners, or a Commissioner of the Supreme Court, and must then be presented at the Estate Duty Office, or forwarded to the Secretary of Estate Duties, Somerset House, or to Dublin or Edinburgh, as the case may be; and every instrument affecting the property, or a copy of it, should be sent for examination, but these will be returned. The account, if satisfactory, will be returned, with a memorandum of instructions for the payment of duty. The account, when stamped, will be filed in the Estate Duty Office, but if a duplicate be delivered, a certificate of the payment of the duty will be given thereon, or, where the property chargeable passes under any deed or other instrument in writing, a certificate of the payment of the duty will be given on such deed or other instrument, if the same be left at or sent to the office for the purpose with the account.

A valuation for account duty is exempted from the stamp duty imposed by the Stamp Act, 1891 (see 1st schedule, Appraisement). The duty is charged on the value of the property at the date of the account, including accrued income between the date of the death and the time of delivering the account. If the property be so disposed of as to come within the jurisdiction of British Courts, it is chargeable whatever its locality; and any property locally situated in the United Kingdom is also chargeable on the death of a person domiciled elsewhere. Effects, not consisting of money or securities for money, and not sold, are to be valued at the time the account is rendered, when inventories and proper valuations thereof will be required. When property has been undervalued, a further stamped account must be delivered; if the duty has been overpaid, though there is no provision in the Act, the Commissioners of Inland Revenue in certain cases authorise repayment. Application will have to be made at the Legacy Duty Office; and an affidavit stating the circumstances, and the original documents, must accompany the application.

The following points have been decided either on the Acts of 1881 and 1889, or on sec. 2 (1) (*c*) of the Finance Act, 1894, which, as indicated above, incorporated the account duty sections with certain modifications. As the decisions upon the last-named statute are, as has been said, authorities upon the interpretation of the account duty sections, they are inserted here.

The provisions of sec. 11 of the Act of 1889 are retrospective (*A.-G.* v. *Theobald*, 1890, 24 Q. B. D. 557).

A gift of a life interest, or other interest terminable on the death of the settlor, is not within the sections (*A.-G.* v. *De Préville*, [1900] 1 Q. B. 223; 69 L. J. Q. B. 283; 81 L. T. 690; 48 W. R. 193).

In order to bring a case within head (*a*) of the sub-section, it is not necessary that the benefit to the donor should be by way of reservation out of the subject-matter of the gift. Where, therefore, a mortgagee, together with the mortgagors, conveyed the mortgaged property to the mortgagee's son, free from the mortgage debt, and the son covenanted

to pay his father during his life £735 per annum, it was held that the transaction was within the sub-section (*A.-G.* v. *Worrall*, [1895] 1 Q. B. 99; 64 L. J. Q. B. 141; 71 L. T. 807; 43 W. R. 118). A payment of a sum of money to the trustees of a charitable society, upon the terms of the society paying to the donor during his life a sum equivalent to 5 per cent. per annum of the amount, was held by the Court of Appeal to be a gift within the sections, and estate duty under 2 (1) (*c*) was held to be payable upon the whole sum paid (*A.-G.* v. *Johnson*, [1903] 1 K. B. 617). By deed in 1885 real and personal estate was given by the owner to the appellant, subject to an annual rent charge issuing out of the realty, the appellant covenanting to pay the rent charge, the funeral and testamentary expenses, and all the donor's debts at his death to the full exhaustion of all his property. In the event of the appellant's death in the donor's lifetime, or of any breach of covenant by the appellant, the donor had power to revoke the deed wholly or in part, any revocation to be without prejudice to any purchase or mortgage made before the revocation. The donor released the rent charge and power of revocation by deed in September 1894, and died in October 1894. The House of Lords held that estate duty, under 2 (1) (*c*), was payable upon all the property comprised in the indenture (*Earl Grey* v. *A.-G.*, [1900] A. C. 124). See, also, the Irish case of *re Cochrane*, [1906] 2 I. R. 200.

Charitable gifts made within twelve months of the death are liable to account duty as much as any other gifts (*A.-G.* v. *Booth*, 1894, 63 L. J. Q. B. 356). A payment of money within twelve months of death, made in pursuance of a voluntary covenant entered into before that period, is a gift within the sections (*A.-G.* v. *Cobham*, 1904, 20 T. L. R. 337; and see *Lord Adv.* v. *Gunning*, 1902, 39 S. L. R. 534). A payment is none the less a gift because it is paid in pursuance of a moral obligation to pay it (*A.-G.* v. *Chamberlain*, 1904, 20 T. L. R. 359). And a disposition of property is none the less a gift within head (*a*) of the sub-section, by reason of its being made in favour of persons in succession, and being, therefore, a settlement (*Miles* v. *R.*, Q. B. D. 12 April 1897 (unreported)).

A sum of money paid to the bridegroom by his father upon marriage within twelve months of death, in consideration of a sum brought into settlement by the father of the bride, was held to be within sec. 2 (1) (*c*) of the Finance Act, 1894 (*A.-G.* v. *Holden*, [1903] 1 K. B. 832; 72 L. J. K. B. 420; 88 L. T. 729; 51 W. R. 685); and in the case in Ireland of *A.-G.* v. *Smyth*, [1905] 2 I. R. 553 (where the scope of the account duty sections is examined at great length), Palles, C.B., held that a voluntary assignment to marriage trustees made by the father of the bridegroom to the trustees of the marriage settlement within twelve months of death was similarly chargeable.

A purchase of stock by husband and wife out of money equally contributed to by them, on the terms that the whole should go to the survivor, was held to be "voluntary," and duty was held to be payable under head (*b*) upon the husband's moiety when the husband died (*A.-G.* v. *Ellis*, [1895] 2 Q. B. 466; 64 L. J. Q. B. 813; 73 L. T. 350; 44 W. R. 13). This case was doubted, however, by Palles, C.B., in the case of *A.-G.* v. *Smyth* (*ante*).

An arrangement was entered into between a father and his sons, under which the father transferred to the sons his shares in a partner-

ship as from a given date or his death, whichever should first happen, conditionally upon the sons executing a deed covenanting to pay to the father during his life interest at 4 per cent. per annum on the value of the shares, and annuities to third persons. The sons having duly executed such deed, and the father having died, it was held that the transfer of the shares was a voluntary settlement within the sections, and that an interest for life in the property transferred was reserved to the settlor (*Crossman* v. *R.*, 1886, 18 Q. B. D. 256; 56 L. J. Q. B. 241; 55 L. T. 848; 35 W. R. 303 (followed in *Lord Adv.* v. *Wilson*, 1894, 31 S. L. R. 819; 21 S. S. C., 4th ser., 997; 1896, W. N. 118)). On similar principles, where under a power contained in a marriage settlement the settlor, who took the first life interest, appointed the property after her death to a volunteer, the two instruments were held to be a voluntary settlement, with a reservation of a life interest, within the section (*A.-G.* v. *Chapman*, [1891] 2 Q. B. 526; 60 L. J. Q. B. 602; 65 L. T. 119; 40 W. R. 79). And a similar decision was given in a case where partnership articles gave power to a partner to dispose of his shares, by deed or will, among a limited class, and the partner exercised the power by will (*A.-G.* v. *Gosling*, [1892] 1 Q. B. 545; 61 L. J. Q. B. 429; 66 L. T. 284; 40 W. R. 366). So an annuity to the widow of a partner payable under a deed of partnership is within head (*c*) of the sub-section, as a voluntary settlement (*A.-G.* v. *Wendt*, 1895, 65 L. J. Q. B. 54; 43 W. R. 701; 73 L. T. 255).

An interest is reserved to the settlor, within the meaning of the section, notwithstanding that, by the terms of the settlement, the trustees have a discretion to withhold payment (*A.-G.* v. *Heywood*, 1887, 19 Q. B. D. 326; 56 L. J. Q. B. 572; 57 L. T. 271; 35 W. R. 772). A settlement of realty in trust for sale is within the section (*A.-G.* v. *Dodd*, [1894] 2 Q. B. 150). [But sec. 2 (1) (*c*) of the Finance Act, 1894, applies to realty as well as to personalty.]

A provision in a marriage settlement in favour of children of the wife by a former marriage is a "trust in favour of a volunteer" within head (*c*) of the sub-section, and duty is payable (*A.-G.* v. *Jacobs-Smith*, [1895] 2 Q. B. 341; 64 L. J. Q. B. 605; 72 L. T. 714; 43 W. R. 657). And a trust to pay off incumbrances on lands, where the person who became entitled to the lands was a stranger to the settlor, was held to be a trust in his favour as a volunteer (*A.-G.* v. *Rathdonnell*, 1893, 32 L. R. Ir. 574; 1896, W. N. 141).

Sec. 11 (1) of the Act of 1889 does not apply to a policy assigned to a donee, and thereafter wholly kept up by him (*Lord Adv.* v. *Fleming* or *Robertson*, [1897] A. C. 145).

It has been held that the word "disposition" includes every act or obligation whereby one person confers on another any beneficial interest in property (*A.-G.* v. *Montefiore*, 1888, 21 Q. B. D. 461; 59 L. T. 534; 37 W. R. 237; and see *per* Lord Macnaghten in *Northumberland* v. *A.-G.*, [1905] A. C. 406).

The duty is payable by the donee, and in the case of several appointees of a fund, is apportionable among them (*In re Croft*, [1892] 1 Ch. 652; 61 L. J. Ch. 190; 66 L. T. 157; 40 W. R. 425; *In re Shaw*, [1895] 1 Ch. D. 343; 64 L. J. Ch. 283; 71 L. T. 873; 43 W. R. 315; *re Foster*, [1897] 1 Ch. 484; 66 L. J. Ch. 220; 76 L. T. 228; 45 W. R. 333; *re Beddington*, [1900] 1 Ch. 771; 69 L. J. Ch. 374; 82 L. T. 557; 48 W. R. 552).

Account, Settled.—A settled account is a statement of the accounts between two parties, which is agreed to and accepted by both as correct. It must be in writing; and it must be *final*, that is, it must show clearly what balance is due, or that no balance is due. An informal release of all demands may be a settled account. The fact that it is stated with the qualification "errors excepted" will not prevent its being a good settled account. It is not enough for the accounting party merely to deliver his account; there must be some evidence that the other party accepted it as correct. But such acceptance need not be express; contemporaneous or subsequent conduct may amount to a sufficient acquiescence (*Clark* v. *Glennie*, 1820, 3 Stark. 10; *Irvine* v. *Young*, 1823, 1 Sim. & St. 333; 57 E. R. 134). The fact that the accounting party delivered up his vouchers to the other party is evidence that both regarded the settlement as final.

The plea of a settled account is a good defence to a claim for an account (see ACCOUNT, ACTION OF); and if coupled with an allegation that the balance shown by such account had before action been paid to the plaintiff, it is also a good defence to an action for money received by the defendant to the use of the plaintiff. In reply to such a plea, however, the plaintiff may allege that the settlement ought to be set aside, because the account contains errors of such a kind, or to such an extent, that it would be inequitable to hold him bound by it. He must in his reply or other pleading specify the errors upon which he relies (*Parkinson* v. *Hanbury*, 1867, L. R. 2 H. L. 1, 19); and if he contends that such errors were made fraudulently, this must also be clearly stated. If he succeeds in proving fraud, the account will be wholly set aside, and the defendant must account *de novo* for every penny which he has received. The same result will follow where there is no fraud, if a considerable number of errors is shown in the account. Indeed, if the parties stand to each other in a fiduciary relationship (*e.g.* as solicitor and client, trustee and *cestui que trust*, guardian and ward), the plaintiff need only prove one "grave or substantial error," and the account will be taken as though there had been no settlement (*per* Davey, L.J., in *In re Webb*, [1894] 1 Ch. pp. 83-86). Where there is no such relationship, and no fraud, and the plaintiff cannot prove any large number of errors, he will probably only obtain leave to "surcharge and falsify," as it is called. Proof of one "definite and important error" will entitle him to this (*Parkinson* v. *Hanbury*, *supra*). It means that the account stands for what it is worth; but that either party may try and amend it, either by adding items in his favour which were wrongly omitted (that is, surcharging), or by striking out items against himself which were wrongly inserted (that is, falsifying). Whether an account shall be opened, or leave only given to surcharge and falsify, is a matter entirely in the discretion of the Court; and whenever one party is allowed to surcharge and falsify, the other may do so too (see *Williamson* v. *Barbour*, 1878, 9 Ch. D. 529; *Gething* v. *Keighley*, *ibid.*, 547).

By virtue of sec. 1, subs. 1 of the Money-lenders Act, 1900, where proceedings are taken in any Court by a money-lender for the recovery of any money lent, or the enforcement of any agreement or security for money lent, and there is evidence which satisfies the Court that the interest or any other monies charged in respect of the sum actually lent are excessive, and that the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, "the Court may

reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account, or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest, and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable." In such an action, however, the Court will not reopen any previous transaction closed by payment, unless it is relevant to or in some way connected with the transaction on which the money-lender is suing (*Saunders* v. *Newbold*, [1905] 1 Ch. 260). Where, however, an action is brought or a counter claim raised by the borrower, or his personal representative, or a surety, or any other person liable on the contract, the Court has a wider power; it will reopen any settled account arising out of any transaction which it deems to be harsh and unconscionable, provided such relief is asked on the pleadings, or properly applied for at the trial (*ibid.*). The fact that money had, in regard to previous transactions, been paid under the pressure of a writ, will in no case prevent the whole matter being reopened (*per* Channell, J., in *Samuel* v. *Bell*, 1905, 22 T. L. R. 118. And see MONEY-LENDERS.

Accounts.—See PARTNERSHIP; PATENTS.

Accounts and Inquiries.—Accounts and inquiries are the machinery employed by the Court for the purpose of obtaining such information as to the rights and interests of the parties to an action, or the questions arising therein, as may be requisite for either giving or working out the judgment or order. The existing practice confers a larger power on the Court to direct such accounts and inquiries than was the case before the Judicature Acts. Under the Consolidated Orders of the Court of Chancery, that Court could direct preliminary accounts and inquiries at any time after appearance of the defendant to the bill of complaint (C. O. 20), provided that all parties would be bound by them, and in general that they were such as would have been directed at the hearing (*Meinertzhagen* v. *Davis*, 1839, 10 Sim. 289; 59 E. R. 628), and not such as would involve the decision of the questions at issue in the cause; and the Court could, where it appeared expedient in the prosecution of a decree or order, direct further accounts or inquiries to be taken or made, not being inconsistent with the decree or order (C. O. 35, r. 19). See cases cited in Morgan, *Chancery Acts and Orders*, 6th ed., p. 397. The Consolidated Orders have been repealed, and now, by R. S. C., 1883, Order 33, r. 2, the Court or a judge may at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which the cause or matter must proceed in the ordinary manner. The rule does not enable the Court to send the whole of the questions in the action to be tried in chambers, but only authorises it to direct before trial accounts and inquiries which would otherwise have been directed at the trial (*Garnham* v. *Skipper*, 1885, 29 Ch. D. 566). For a case in which the provisions of the rule were applied after judgment, see *Taylor* v. *Mostyn*, 1886, 33 Ch. D. 226. But accounts and

inquiries directed after judgment must be such as are auxiliary to working it out, and must not be inconsistent with it (*Partington* v. *Reynolds*, 1858, 4 Drew. 253; 62 E. R. 98; *Nelson* v. *Booth*, 1858, 3 De G. & J. 119; 44 E. R. 1214). Thus an order charging an executor on the footing of wilful default cannot be made after judgment directing the common account (*Partington* v. *Reynolds*, *ubi sup.*); unless, indeed, wilful default has been alleged, and a case made for it on the pleadings; in which event an account on the footing of wilful default can be directed either at the hearing or at any subsequent stage (*Barber* v. *Mackrell*, 1879, 12 Ch. D. 538; *Job* v. *Job*, 1877, 6 Ch. D. 562; *Mayer* v. *Murray*, 1878, 8 Ch. D. 424; *In re Symons, Luke* v. *Tonkin*, 1882, 21 Ch. D. 757). As a rule, however, charges of wilful default ought to be disposed of at the hearing, and not referred for inquiry to chambers (*Smith* v. *Armitage*, 1883, 24 Ch. D. 727).

Under R. S. C., Order 15, r. 1, where the writ of summons has been indorsed for an account under Order 3, r. 8, or where the indorsement involves taking an account, if the defendant fails to appear, or does not after appearance satisfy the Court that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions usual in the Chancery Division in similar cases, is to be forthwith made. An order under this rule usually takes the place of the judgment in the action, differing in this respect from one under Order 33, r. 2, which, as stated above, is generally preliminary to the trial (*Garnham* v. *Skipper*, *ubi sup.*). Though the words of the rule are somewhat more extensive than under the corresponding rule of 1875, an order is not obtainable under it unless the right of the plaintiff to have an account from the defendant is quite free from doubt, for otherwise there is a "preliminary question to be tried" within the rule. Only common accounts and inquiries can be directed, and not accounts and inquiries which depend on the plaintiff establishing a case for them at the hearing (*In re Gyhon, Allen* v. *Taylor*, 1885, 29 Ch. D. 834).

The rule extends to the King's Bench Division, but as that Division has not the requisite machinery for taking complicated accounts, an action involving such accounts will be transferred to the Chancery Division (*Leslie* v. *Clifford*, 1884, 50 L. T. 590), except in simple cases (*York* v. *Stowers*, W. N., 1883, 174).

An application for an order for accounts and inquiries under either Order 15, r. 1, or Order 33, r. 2, is made at chambers, either by summons, or, if there has been a summons for directions in the action, by notice under such summons. The order may be made by a master or district registrar, unless the case falls within Order 55, r. 15A, in which event it must be made by the judge in person.

By Order 16, r. 40, parties served with notice of a judgment or order may, within one month after service, apply to vary or add to the judgment or order, and may thus obtain an order for accounts or inquiries not originally directed.

Accounts and inquiries directed by the Court are usually prosecuted in chambers (see R. S. C., Order 55, rr. 28-64, and *In re Taylor, Turpin* v. *Pain*, 1890, 44 Ch. D. 128). Where, however, the Court so directs, they may be taken and made before a district registrar (see Judicature Act, 1873, s. 66; *Macdonald* v. *Foster*, 1877, 6 Ch. D. 193; *Sykes* v. *Schofield*, 1880, 14 Ch. D. 629).

Order 33, rr. 3-8, incorporate several of the provisions of the old

Chancery practice as to the method of preparing and taking accounts directed by a judgment or order; whilst rule 9 of the same order enables the Court to give the necessary directions to prevent undue delay in the prosecution of any accounts or inquiries.

Under the Arbitration Act of 1889, s. 14, where a prolonged examination of documents is involved, or the question in dispute consists wholly or in part of matters of account, the cause, or any question or issue of fact, may be referred to a special referee or arbitrator, or an official referee. See ARBITRATION. [Dan. Ch. Pr., 7th ed., pp. 820 *et seq.*; Seton, 6th ed., pp. 1352-89; *The Annual Practice*, 1906.]

Accounts, Falsification of.—This offence stands in a somewhat perplexing relation to forgery, embezzlement, and obtaining money by false pretences (*q.v.*). Making a false original entry in a book or account is not forgery at common law or by statute (*In re Windsor*, 1865, 34 L. J. M. C. 163), but is good evidence of embezzlement, and if money is obtained by means of such entry it is obtained by false pretences. The offence is now in certain cases a statutory misdemeanor.

1. In 1857 falsification of books and accounts by company officials was first made punishable by 20 & 21 Vict. c. 54, s. 7.

By the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 83, directors, managers, public officers, or members of a body corporate or public company, who, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security of the corporation or company, make or concur in making a false entry, or omit or concur in omitting any material particular, in any book of accounts or other document, are guilty of a misdemeanor, punishable by penal servitude for three to seven years, or imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 96, ss. 75, 83; 54 & 55 Vict. c. 69, s. 1). It will be noted that the later paragraph does not definitely state that the book or document must be the property of the corporate body. The offence is not triable at Quarter Sessions (*q.v.*) (24 & 25 Vict. c. 96, s. 87). Liability to conviction for this offence does not entitle the offender to refuse to answer questions in any civil proceeding (24 & 25 Vict. c. 96, s. 85). The fact that the offence was first disclosed by the accused in his examination in bankruptcy is no bar to his prosecution (53 & 54 Vict. c. 71, s. 27). But where the offence was first disclosed in examination in the winding-up of a company or in an action, no prosecution can, it would seem, be instituted. The examination of the accused in bankruptcy is not admissible to prove the offence (*R.* v. *Erdheim*, [1896] 2 Q. B. 260), but his statement of affairs would be admissible (*R.* v. *Pike*, [1902] 1 K. B. 552).

A similar provision to that of s. 83 of the Larceny Act, 1861, is made by the Companies Act, 1862, 25 & 26 Vict. c. 89, s. 166, as to mutilation or falsification of books or documents of a company in a compulsory or voluntary liquidation, by a director, officer, or contributory. Prosecution by the liquidator at the cost of the company may be directed or sanctioned by the Court (25 & 26 Vict. c. 89, ss. 167, 168).

2. Clerks, officers, servants, or persons employed in that capacity, are guilty of a misdemeanor if, wilfully and with intent to defraud, they do any act such as is described under 1, with reference to any writing, book, etc., belonging to or in the possession of their employer, or received by

them for or on behalf of the employer (*R.* v. *Palin*, [1906] 1 K. B. 7 (C. C. R.)). The punishment is the same as for No. 1, but the offence can be tried at Quarter Sessions (Falsification of Accounts Act, 1875, 38 & 39 Vict. c. 24, s. 1). (For definition of clerk, etc., see EMBEZZLEMENT.) It is not necessary in the case of offence 2 to allege or prove an intent to defraud a particular person (24 & 25 Vict. c. 96, s. 67; 38 & 39 Vict. c. 24, s. 2). The question of intent to defraud is essentially one for the jury (*R.* v. *Drewett*, 1904, 69 J. P. Rep. 37). The offences can be committed by handing to an innocent agent, for insertion in the account, a note of a false entry to be made (*R.* v. *Butt*, 1884, 15 Cox C. C. 564; *R.* v. *Oliphant*, [1905] 2 K. B. 67 (C. C. R.)).

3. Falsification of public accounts by a servant of the Crown seems to be a misdemeanor both at common law (*R.* v. *Bembridge*, 1783, 22 St. Tr. 1), and under 38 Hen. VIII. c. 39, ss. 48, 49, and 50 Geo. III. c. 59, and where such falsification is committed by a British official outside Great Britain he may be tried in England under 42 Geo. III. c. 85; Arch. Cr. Pl., 23rd ed., 1014.

4. There are a great number of statutes making falsification of certain accounts and documents criminally punishable, *e.g.* the Friendly Societies Act, 1896, 59 & 60 Vict. c. 25, s. 88; the Collecting Societies and Industrial Assurance Companies Act, 1896, 59 & 60 Vict. c. 26, s. 14 (2); the Industrial and Provident Societies Act, 1893, 56 & 57 Vict. c. 39, s. 65; the Building Societies Act, 1894, 57 & 58 Vict. c. 47, s. 22; and see *Official Index to Statutes*, ed. 1905, tit. "Fraud," 3 (*c*).

Accounts Stated.—An account stated is an admission of a sum of money being due from one party to another, from which a promise to pay the amount is implied in law (*Irving* v. *Veitch*, 1837, 3 Mee. & W. 906; 49 R. R. 511). In order to constitute an account stated there must be a statement of some certain amount of money being due, which statement must be made by the debtor or his agent, either to the creditor himself, or to some agent of his (*Hughes* v. *Thorpe*, 1839, 5 Mee. & W. 656, 667). The account may be stated orally or in writing, and it need not contain any express agreement to pay, as such agreement will be implied. If the account is stated concerning a debt which is barred by the Statute of Limitations (see LIMITATION), it must, in order to enable it to be sued upon, be in writing, signed by the party chargeable therewith (9 Geo. IV. c. 14, s. 1; *Jones* v. *Ryder*, 1838, 4 Mee. & W. 32; 51 R. R. 452). An account stated in writing need not be stamped, unless it is in the form of a bill of exchange or promissory note, in which case it must be duly stamped as such, as otherwise the person taking or receiving it is not entitled to recover thereon, or to make it available for any purpose whatever (54 & 55 Vict. c. 39, s. 38 (1); *Green* v. *Davies*, 1826, 4 Barn. & Cress. 235; 28 R. R. 230; *Ashling* v. *Boon*, [1891] 1 Ch. 568), [but see *Birchall* v. *Bullough*, [1896] 1 Q. B. 325]. An I O U is evidence of an account stated, and may be sued upon as such (*Buck* v. *Hurst*, 1866, L. R. 1 C. P. 297). An account stated is not necessarily final or binding between the parties to it, for it may be shown to have been stated by mistake (*Thomas* v. *Hawkes*, 1841, 8 Mee. & W. 140; 58 R. R. 648; *Perry* v. *Attwood*, 1856, 6 El. & Bl. 691; 25 L. J. Q. B. 408); or in respect of a future or contingent debt (*Lemere* v. *Elliott*, 1861, 6 H. & N. 656; 30 L. J. Ex. 350); or for a debt for which there was

no consideration (*French* v. *French*, 1841, 2 Man. & G. 644; *Kennedy* v. *Broun* 1863, 13 C. B. N. S. 677; 32 L. J. C. P. 137); or for a debt in respect of which there was a failure of consideration (*Jacobs* v. *Fisher*, 1845, 1 C. B. 178; *Wilson* v. *Wilson*, 1854, 14 C. B. 616); or for which the consideration was illegal (*Rose* v. *Savory*, 1835, 2 Bing. N. C. 145; 42 R. R. 560); or for which the person making the admission was not liable (*Petch* v. *Lyon*, 1846, 9 Q. B. 147; 72 R. R. 205).

By sec. 1 of the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, all accounts stated with infants are absolutely void.

An account stated forms a distinct cause of action, and, if sued upon as such, it should be alleged with particulars in the statement of claim, but if only relied upon by way of evidence or admission of any other cause of action which is pleaded, it should not be alleged in the pleadings (R. S. C., Order 20, r. 8).

Accountable Receipt.—A written acknowledgment of the receipt of money or goods to be accounted for by the receiver. The forgery of an accountable receipt, or any indorsement on, or assignation of, it, with intent to defraud, is a felony punishable by penal servitude or imprisonment (24 & 25 Vict. c. 98, s. 23). A scrip certificate of a railway company is not an accountable receipt (*Clark* v. *Newsam*, 1846, 1 Ex. Rep. 131; 74 R. R. 615); a pawnbroker's ticket is an accountable receipt for goods (*R.* v. *Fitchie*, 1857, Dears. & B. C. C. 175). An entry in a bank pass-book of the receipt of money is an accountable receipt (*R.* v. *Moody*, 1862, L. & C. 173).

Accountant.—It is open to anybody to be—at least in name—an accountant, for accountants have no special legal status. They differ from members of the legal and medical professions in this respect, namely, that there is no special qualification which the law requires to enable a man (or woman) to practise accountancy.

Whilst many Acts of Parliament relating to public companies, public authorities, etc., provide that accounts shall be kept in manner specified, and shall be audited, it is quite the exception to find that the audit must be the work of an accountant (see for example the Companies Act, 1879, s. 7, which deals with banking companies' accountants; Metropolis Water Act, 1871, ss. 37 to 42; Friendly Societies Act, 1875, s. 14; Industrial and Provident Societies Act, 1893, s. 13). The Companies' Clauses Act, 1845, s. 108, provides that the auditor may employ an accountant, but this employment is not compulsory, nor need the accountant be a member of any professional society of accountants; and see the Companies Act, 1862, table A, clause 93, [the Companies Act, 1900, 63 & 64 Vict. c. 48, ss. 21-23]. The Building Societies Act, 1894, s. 3, provides that one at least of the auditors of the society shall be "a person who publicly carries on the business of an accountant." And by statute, made under sec. 11 of the Universities of Oxford and Cambridge Act, 1877, one of the auditors of the accounts of an Oxford college must be either "a professional accountant, carrying on business in London and Westminster, or a person conversant with accounts, approved by the Permanent Secretary to Her Majesty's Treasury." The words, "a person who publicly carries on the business of an accountant," and "a professional accountant carrying on business," have not yet received judicial interpretation. Probably it is unnecessary that the

auditor should be a member of any recognised professional institute or society; on the other hand, a person whose habitual business is solely or to a considerable extent that of accountancy would alone be qualified for appointment as the accountant-auditor of a building society or of an Oxford college. Under sec. 4 of the Building Societies Act, an accountant may be appointed by the Registrar of Friendly Societies to inspect the books of the society and to report thereon.

The chief business of an accountant is the investigation and auditing of accounts; but, in addition, accountants act as bankruptcy trustees, liquidators, and receivers. In this work they have no monopoly. Any "fit person, whether a creditor or not," may be a trustee in bankruptcy (Bankruptcy Act, 1883, s. 21); any person appointed by the Court (Companies Act, 1890, s. 6), or, in voluntary liquidation, selected by the company (Companies Act, 1867, s. 133), may be a liquidator. Although accountants are not obliged to be members of any recognised society, in fact the greater number of professional accountants belong to one of two institutions. These are, the Institute of Chartered Accountants, and the Society of Accountants and Auditors.

The Institute of Chartered Accountants in England and Wales was incorporated by royal charter on 11th May 1880. It is in effect an amalgamation of several older societies of accountants, and the charter was given in recognition of the great and increasing importance of accountants, and in order to "secure for the community the existence of a class of persons well qualified to be employed in the responsible and difficult duties often devolving upon public accountants." The Institute is a body corporate with perpetual succession, and is governed by a council of not more than forty-five members. The members are Fellows or Associates of the Institute, and are entitled to the use of the initials F.C.A. or A.C.A. They may not follow any business or occupation other than that of a public accountant, or some business which, in the opinion of the council, is incident thereto or consistent therewith. As regards admission to the Institute, persons who have been for ten years continuously in practice as public accountants need not pass examinations. But, with this exception, those who desire to be members of the Institute must generally be articled to a public accountant for a period varying, with the circumstances, from three to five years, and must pass certain examinations. The Society of Accountants and Auditors is a company incorporated in 1885, under sec. 23 of the Companies Act, 1862, and is licensed by the Board of Trade to omit the word "limited" from its title. No examination is necessary for the original members, nor need those who were in practice on 31st December 1895 pass examinations; in other cases, membership of the society is obtained only after examinations have been satisfactorily passed. Public accountants, public accountants' principal clerks, and official accountants in the employ of the Government, or of bankers, corporations, public bodies, or limited companies, are eligible for membership; accountants' clerks may be student members of the society.

Accountants of all kinds are entitled to charge for their services, the fees being fixed by arrangement, or, in the absence of arrangement, a reasonable fee will be payable to them. They must do their work with such care and skill as would reasonably be expected of persons who hold themselves out as able to do the class of work undertaken by them (see NEGLIGENCE). Bills have been introduced into the House of Commons

to render accountancy to a certain extent a close profession, and to give accountants a legal status. The bills have not progressed, and an immediate change in the law is improbable. See further under AUDITORS. [The history of accountants is dealt with in an interesting address by Mr. F. Whinney, delivered at a meeting of the Institute of Chartered Accountants, held on 22nd June 1887.]

Accountant-General.—Prior to the Court of Chancery (Funds) Act, 1872, 35 & 36 Vict. c. 44, there were two officials with this title; one in the Court of Chancery, the other in the Court of Exchequer.

Until 1725 the Masters in Chancery had charge of funds in Court, in suits referred to them; and the Usher, in suits not so referred to; holding them for distribution according to orders of Court; and in the meantime employing them for their own use. When the South Sea Scheme collapsed in 1720, five Masters were found to be in default for upwards of £100,000 (*Report of the Chancery Funds Commission*, 1864). Under sec. 3 of 12 Geo. I. c. 32, in 1725, an accountant-general was appointed by the Court to manage the suitors' funds, which had now been deposited in the Bank of England, in such manner as had been or should be prescribed by order. In 1820, 1 Geo. IV. c. 35, an accountant-general, with similar duties, was created for the Court of Exchequer, on its Equity side, to take the place of the deputy-remembrancer.

The above-mentioned Act of 1872 abolished both offices, and appointed Her Majesty's Paymaster-General in their stead.

By the Supreme Court of Judicature (Funds) Act, 1883, 46 & 47 Vict. c. 29, one accounting department, the Supreme Court Pay Office, was established for all the Courts and Divisions thereof, and their funds directed to be placed to the account, or credit, of the Paymaster-General, on behalf of the Supreme Court. See PAY OFFICE.

Accountants of the Crown.—Public officers who receive or collect public moneys, and are bound to account therefor into the Exchequer, in manner prescribed by statute, or Treasury regulations made thereunder. As Crown debtors the special remedies of the Crown for the recovery of its debts are available against them, in case of default. See CROWN DEBTS.

The Exchequer and Audit Departments Act, 1866, 29 & 30 Vict. c. 39, defines "principal accountants" as those who receive issues, directly, from the accounts of Her Majesty's Exchequer at the Banks of England and Ireland; and "sub-accountants" as those who receive advances by way of imprest (that is, for expenditure on specified objects) from principal accountants, or who receive fees, or other public moneys, through other channels.

The most important of the principal accountants are the Paymaster-General, to whose account at the Bank of England, or Ireland, moneys voted by Parliament, or charged for the Consolidated Fund services, are transferred on the orders of the Treasury; and the officials of the various departments to whose accounts the necessary sums for public services are credited, and for which they become responsible. See PAY OFFICE.

The sub-accountants are the collectors of the various branches of revenue, and receivers of public moneys, who may be required by the Treasury to render accounts to the Comptroller and Auditor-General.

The modes of accounting, the manner of auditing, and other provisions relating to both classes of public accountants, are contained in the Acts 39 & 40 Geo. III. c. 54; 50 Geo. III. c. 59; 29 & 30 Vict. c. 39; and 54 & 55 Vict. c. 24, s. 1.

[See also Anson, *Law and Custom of the Constitution*, part ii. pp. 181, 326, 340-343.]

Accredit, in international law, is to furnish the envoy of a State with papers called credentials or letters of credence, certifying his public character, and insuring his reception with the deference due to him in such capacity. (See DIPLOMATIC AGENTS.)

Accretion.—This word has reference primarily to the principle whereby land formed gradually and imperceptibly by the action of water goes to the owner of the adjacent soil, such newly-formed land being said to *accresce* to him, or, in other words, become his property. See ACCESSION TO PROPERTY; ALLUVION.

The word is also applied to the state of circumstances which arises when a person having no right, or only an imperfect right, of property, makes a grant, and subsequently has his right perfected. So long as his right is imperfect, his grantee can be in no better position than himself, but the instant his right becomes perfected, the Latin maxim applies, *Jus superveniens auctori accrescit successori, i.e.* the act in the law whereby the title of the person making the grant becomes perfect serves also to validate the title of his grantee. The former will then be estopped from denying his grant (see ESTOPPEL), or, as it has been expressed, "the interest, when it accrues, feeds the estoppel." See the leading case, *Doe d. Christmas* v. *Oliver*, 1829, 5 Man. & Ry.; 34 R. R. 358.

Accrue.—The 5th section of the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, secures to the married woman as her separate property (see HUSBAND AND WIFE) all real and personal property, her title to which, whether vested or contingent, shall *accrue* after the commencement of the Act. After some conflict of opinion as to the meaning of the section, which might refer either to property in which the married woman acquires a title for the first time since the Act, or to property in which she had a reversionary interest at the time when the Act came into operation, and which fell into possession afterwards, it has been settled that it is only where the married woman acquires a title for the first time since the Act that the section applies, and that a prior reversion falling into possession is not separate property (*Reid* v. *Reid*, 1886, 31 Ch. D. 402, overruling *Baynton* v. *Collins*, 1884, 27 Ch. D. 604); Stroud, *Jud. Dict.*

Accruer of Right to Land.—See LIMITATION.

Accrued Shares.—Clauses in a will disposing of the shares of devisees or legatees, dying before a given period or event, do not, in the absence of a distinct evidence of intention, extend to shares which have once accrued under those clauses, so as to pass them a second time (*Ex parte West*, 1784, 1 Bro. C. C. 575; 28 E. R. 1306; *Melsom* v. *Giles*, 1870, L. R. 5 C. P. 614). Accrued shares do not pass under the word share or "portion" (*Bright* v. *Rowe*, 1834, 3 My. & K. 316; 40 E. R. 121;

41 R. R. 75). Accrued shares will go with original shares, if there is an intention expressed that they should do so. If the testator is dealing with his residue as a whole, and disposing of it as a whole, no distinction will be drawn between original shares and accrued shares (*In re Allan, Dow* v. *Cassaigne*, [1903] 1 Ch. 276). (See Theobald on *Wills*, 6th ed., 1905, p. 640, and *Greenwood* v. *Sutcliffe*, 1854, 14 C. B. 226.)

Accumulations.—Until the close of the 18th century, the law placed no restriction on the accumulation of the income of property, and the suspension of all enjoyment of it, so long as the direction for accumulation did not transgress the rule prohibiting the suspension of the alienation of property beyond the period of a life or lives in being and twenty-one years afterwards (see PERPETUITY). In the year 1800, however, the legislature considered it necessary to impose some restriction on directions for the accumulation of income, in consequence of a provision contained in the will of a Mr. Thellusson (who died in 1796), directing the accumulation of the income of his large property during the lives of all his issue male living at his decease, and the survivor of them. Though this direction was held to be valid, the Act 39 & 40 Geo. III. c. 98 (commonly called the Thellusson Act), was passed in order to prevent such dispositions for the future. This statute [which applies to deeds and wills, prohibits the settlement or disposition of any property in such manner as that the income shall be accumulated for any longer term than] one only of the following periods:—(1) The life of the settlor; (2) the term of twenty-one years from his death; (3) during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the settlor; (4) during the minority or respective minorities of any person or persons who, if of full age, would be entitled to the income directed to be accumulated. These still remain the general rules of English law with regard to directions for the accumulation of income, but there are to be noted several exceptions to, and qualifications of, the provisions of the Act, the language of which has, by more than one judge, been condemned as ill-defined. The Act itself provides (s. 2) that nothing contained in it shall extend to any provision for payment of the settlor's debts [see *re Heathcote*, [1904] 1 Ch. 826], or those of any other person or persons, or to any provision for raising portions (see PORTIONS) for the children of the settlor, or any person interested under the settlement, or to any direction touching the produce of timber or wood. It has further been held (*Vine* v. *Raleigh*, [1891] 2 Ch. 13, at page 26; [*re Gardiner*, [1901] 1 Ch. 697]) that all improvements in substance, which can in any fair sense be regarded as coming under the words "maintaining, in good habitable repair, houses and tenements," are outside the Thellusson Act altogether, though money laid out in building houses on that land would be within the Act; and a provision for insuring houses is also good (see *In re Mason*, [1891] 3 Ch. 467). Nor is a direction to pay out of the testator's property the premiums on a policy of insurance, effected by him upon the life of another, rendered void by the Act; such a provision remains valid for the whole term of the life insured (*Baird* v. *Lister*, 1851, 9 Hare, 177). And if a direction for accumulation offend against the statute, it is nevertheless not altogether void (so long as it does not offend against the rules as to perpetuities), but is good up to the limits imposed by the Act. Thus a trust by will for accumulation

during the life of another is good for twenty-one years (*Griffiths* v. *Vere*, 1803, Tudor's *Leading Cases in Real Property*, 497, and 9 Ves. 127; 32 E. R. 550). And an accumulation is good if it can at any moment be put an end to (*Bateman* v. *Hotchkin*, 1847, 10 Beav. 426; 50 E. R. 646). On the other hand, it must be observed that accumulation will only be allowed for *one* of the periods permitted by the Act; *e.g.* a direction to accumulate income for twenty-one years after a testator's death, and thereafter during certain minorities, was held good only for the twenty-one years (*Wilson* v. *Wilson*, 1851, 1 Sim. N. S. 288; 61 E. R. 111; *Jagger* v. *Jagger*, 1883, 25 Ch. D. 729). And the construction to be put upon the Act is the same whether the accumulation be directed by a deed or by a will (*Lady Rosslyn's Trust*, 1850, 16 Sim. 391; 60 E. R. 925). Further, though accumulation be directed, or payment deferred, a legatee, if entitled absolutely, can require payment as soon as he can give a discharge (*Saunders* v. *Vautier*, 1841, 4 Beav. 115; 49 E. R. 282); and this is so as much if the legatee is a charity as if he is an individual (*Wharton* v. *Masterman*, [1895] App. Cas. 186). And though the accumulation be directed to begin many years after the testator's death, it must still end at the expiration of twenty-one years from his death (*Webb* v. *Webb*, 1840, 2 Beav. 493; 48 E. R. 1273; *Shaw* v. *Rhodes*, 1839, 1 My. & Cr. 154; 40 E. R. 335; 43 R. R. 161). The statute provides that income, the accumulation of which it forbids, shall go and be received as if such accumulation had not been directed (see *Eyre* v. *Marsden*, 1838, 2 Keen, 574; 48 E. R. 748; 48 R. R. 73; *Sewell* v. *Denny*, 1847, 10 Beav. 315; 50 E. R. 603; 76 R. R. 137); [*i.e.* shall go to the person entitled *in possession* to the property from which the property is derived (the statute does not operate to accelerate (see ACCELERATION) a gift in remainder), to the residuary devisee or legatee, or to their heir or next-of-kin (see *re Travis*, [1900] 2 Ch. 541), as the case may be]. One subsequent restriction on accumulation has been imposed by the legislature in the Accumulations Act, 1892, 55 & 56 Vict. c. 58, which forbids the settlement or disposition of any property, real or personal, so as to accumulate the income "for the purchase of land only" for any longer period than during the minority of a person who, if of full age, would be entitled to receive the income [*re Clutterbuck*, [1901] 2 Ch. 285; *re Baroness Llanover*, [1903] 2 Ch. 330]. The Thellusson Act was extended, in 1848, to heritable property in Scotland by Statute 11 & 12 Vict. c. 36, s. 41; but it does not apply to property in Ireland.

PRECEDENT.

[*The following is a precedent drawn with regard to the Thellusson Act, of a trust for accumulation following, in a will, a discretionary power in the trustees to apply income for the benefit of a son during his life:—*

And subject to the discretionary trust lastly hereinbefore contained, Upon trust for the period of twenty-one years after my death to accumulate and invest the income of the trust fund, or so much thereof as shall from time to time not be paid or applied as aforesaid by my trustees, in augmentation of the principal or capital of the trust fund in the nature of compound interest: And from and after the failure or

determination of the trust of income hereinbefore contained in favour of the said [*son*] during his life, and after the expiration of twenty-one years after my death, my trustees shall hold the capital of the trust fund and the accumulations (if any) thereof upon trust to pay and apply, etc.]

Accumulative Judgment.—See CUMULATIVE SENTENCES (JUDGMENT).

Accusation of Crime.—1. Whoever outside a Court of justice accuses another person of any criminal offence, punishable by imprisonment, whether it be punishable summarily or on indictment, is liable, if the accusation be false, to an action for defamation of character (see DEFAMATION). If the accusation is made in writing, the maker of it is also liable to indictment, and to be entitled to acquittal the defendant must satisfy the jury not only that the accusation is true, but also that it was made in the public interest (6 & 7 Vict. c. 96, s. 6). The punishment is fine or imprisonment for not over two years if the falsity of the statement is, and not over one year if it is not, known to the maker (6 & 7 Vict. c. 96, ss. 4, 8). It is immaterial whether the accusation is made to the person accused or to a third person (*R.* v. *Adams*, 1888, 22 Q. B. D. 63).

Where the libel is published in a registered newspaper, the defence of truth and public interest can be considered at the preliminary inquiry (44 & 45 Vict. c. 60, ss. 4, 17; see DEFAMATION); but in other cases this cannot be done (*R.* v. *Carden*, 1880, 5 Q. B. D. 1). Where the accusation is made orally, an indictment will not lie in English law; but the accuser may be summarily convicted for using language calculated to provoke a breach of the peace.

2. No action or indictment for defamation will lie for any accusation of crime made in a Court of justice in the course of any legal proceedings, whether by judge, jury, advocate, party, or witness (*Munster* v. *Lamb*, 1883, 11 Q. B. D. 588); nor, it would seem, by a witness in a statement made to a party or his solicitor in preparing his proof for a trial (*Watson* v. *M'Ewan*, [1905] A. C. 480). See PRIVILEGE; ADVOCATE.

But a person prosecuted for crime maliciously, and without reasonable and probable cause, has his remedy by action for malicious prosecution, or, as it is termed in Scotland, judicial slander. See MALICIOUS PROSECUTION.

A conspiracy to accuse a person falsely of crime is indictable (Arch., 23rd ed., 1285); and where the accusation is falsely made on oath the maker is indictable for perjury.

To publish an accusation of crime against any person, with intent to extort money or money's worth, is a misdemeanor, punishable by imprisonment, with or without hard labour, for not more than three years (5 & 6 Vict. c. 96, s. 3; 54 & 55 Vict. c. 69, s. 1 (2)). And to accuse, with like intent, any person of rape or "infamous crime" (see Arch., Cr. Pl., 23rd ed., p. 537) is felony, whether the accusation is written or oral, and is punishable by penal servitude for life, or not less than three years, or by imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 96, ss. 46, 47, 48; 54 & 55 Vict. c. 69, s. 1). Hereon see ABOMINABLE CRIME; EXTORTION; MENACES.

Accustomed Rent.—It was formerly usual, in powers of leasing, to require the reservation of "the ancient and accustomed rent," or the "accustomed rent," instead of the "best" or "most" rent. This is now done very rarely. Where such a term is introduced, the better opinion is that, as a general rule, the rent reserved at the time of the creation of the power, where a lease was then in being, or the last before it, where no lease was then in being, is the rent to which the powers must be taken to refer (Sugden on *Powers*, 8th ed., 790; Farwell on *Powers*, 2nd ed., 624; Platt on *Leases*, i. 465; *Doe d. Douglas* v. *Lock*, 1835, 2 Ad. & E. 705; 41 R. R. 496; *Roe d. Brune* v. *Rawlings*, 1806, 7 East, 279; 8 R. R. 632; *Doe d. Lord Egremont* v. *Grazebrook*, 1843, 4 Q. B. 406; 62 R. R. 388).

Acknowledgment.—This expression is used in several Acts of Parliament relating to limitation of time for actions, namely, 9 Geo. IV. c. 14 (the Statute of Frauds Amendment Act, 1828); 3 & 4 Will. IV. c. 27 (the Real Property Limitation Act, 1833); 3 & 4 Will. IV. c. 42 (the Civil Procedure Act, 1833); 23 & 24 Vict. c. 38 (the Law of Property Amendment Act, 1860); and 37 & 38 Vict. c. 57 (the Real Property Limitation Act, 1874). Banning on *Limitations*, 2nd ed., p. 41, states that there are four requisites of a sufficient acknowledgment—(1) It must be made in sufficient terms; (2) By the proper person; (3) To the proper person; and (4) With the proper formalities, if any.

The Limitation Act of 1623 provides limitations for nearly all personal actions in England; under this Act, though there was no provision to that effect, it was soon held that an acknowledgment, even by parol, took the case out of the statute in cases of debt, though not in tort or trespass. A remedy for this was provided by the Statute of Frauds Amendment Act, 1828, 9 Geo. IV. c. 14, which enacted that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Act of 1623, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and it was further provided that, in the case of joint-contractors, one contractor was not to be prejudiced by the written acknowledgment or promise of any of the other contractors; that nothing in the Act was to lessen the effect of any payment of any principal or interest by any person; and that, though in an action against joint-contractors the plaintiff might be barred in the case of one, he should be entitled to recover against another, by virtue of a new acknowledgment or promise. This Act merely required proof of an acknowledgment to be in writing, and did not alter the law of acknowledgments. The Act did not provide for signature by an agent, but the Mercantile Law Amendment Act, 1856, has enacted that an acknowledgment made in writing, signed by an agent duly authorised so to do, shall have the same effect as if signed by the principal.

The cases on the Acts were conflicting, but in *Tanner* v. *Smart* (a leading case), 1827, 6 Barn. & Cress. 603; 30 R. R. 461, an action was brought on a promissory note, and the defendant pleaded the Statute of Limitations. The following acknowledgment was proved: "I cannot pay the debt at present, but I will pay it as soon as I can." Held, that

this was not sufficient, without proof of the defendant's ability to pay. The rule since that case has been that there must be an express promise to pay, or such an acknowledgment of the debt that a promise is to be implied (see *Phillips* v. *Phillips*, 1844, 3 Hare, 281; 64 R. R. 296).

There have been a large number of cases since *Tanner* v. *Smart*, of which cases a short and well-arranged summary will be found in Darby and Bosanquet's *Statutes of Limitations*, 2nd ed., p. 69. See also Chitty's *Statutes*, 5th ed., *Limitation*, p. 13 *et seq.* In *In re Buskin*, 1894, 15 R. 117, the debtor wrote: "I don't see how it is possible for me to be indifferent on the matter of this debt; if I were able in any way to reduce it further, you may be quite sure I should do so": held a sufficient acknowledgment. In an action commenced in 1902, upon a promissory note given by the plaintiff to the defendant in 1881 for £100, with interest, it was proved that the defendant had, in 1901, written a letter in which, after asserting that there had been certain payments by him on account of the note, he used expressions importing that he was willing that an account should be taken between himself and the plaintiff, and that he would pay what was thereupon found to be due. It was found on the trial that no payments had been made on account of the note. It was held by the Court of Appeal, affirming the judgment of Bruce, J., that the letter afforded sufficient evidence of a new promise to take the case out of the Statute of Limitations (*Langrish* v. *Watts*, [1903] 1 K. B. 636; and *cf.* also *Astbury* v. *Astbury*, [1898] 2 Ch. 111; *In re Macdonald; Dick* v. *Fraser*, [1897] 2 Ch. 181). The maker of a promissory note repaid it by instalments to the original holder, after the latter had endorsed it over to the plaintiffs, to whom one payment was communicated. It was held by the Court of Appeal that such payments were not acknowledgments of the debt, so as to prevent the Limitation Act, 1623, 21 Jac. I. c. 16, from running, as there was no authority to receive payments on behalf of the plaintiffs (*Stamford, Spalding, and Boston Bank Co.* v. *Smith*, [1892] 1 Q. B. 765). A signature by an agent is not sufficient under these statutes.

Acknowledgment of Title.—By 3 & 4 Will. IV. c. 27, s. 14, it is enacted that, when any *acknowledgment* of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person to whom such *acknowledgment* shall have been given, shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such *acknowledgment* shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such *acknowledgment*, or the last of such *acknowledgments*, if more than one, was given. An acknowledgment under this section must be in writing, and cannot be given by the giver's agent. Darby and Bosanquet's *Statutes of Limitations*, p. 383 *et seq.*, gives a summary of the cases as to what acknowledgment is sufficient. See also Chitty's *Statutes*, 5th ed., *Limitation*, p. 27. There is a doubt as to whether this section causes the time to commence to run from an acknowledgment, even though it had then commenced to run. It was held by Malins, V.-C., in *Sanders* v. *Sanders*, 1881, 19 Ch. D. 373,

that an acknowledgment after the expiration of twenty years was sufficient, but the Court of Appeal in effect over-ruled this view.

Mortgages.—The 28th section of the Act, now repealed by 37 & 38 Vict. c. 57, was a section applying to mortgages similar to the 7th section of the later Act, except that twelve years was substituted for twenty years by the 7th section, which enacted that, when a mortgagee shall have obtained possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an *acknowledgment* in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such cases no proceeding shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; an acknowledgment to one mortgagor or his agent is sufficient. But, in the case of mortgagees, an acknowledgment shall only be effectual as against persons signing it, and persons claiming under them, and shall not give the mortgagor a right to redeem the mortgage against persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees as shall have given such acknowledgment shall be entitled to a divided part of the property comprised in the mortgage, and not to any ascertained part of the mortgage money, the mortgagor shall be entitled to redeem the divided part on payment of the part of the mortgage money bearing the same proportion to the whole as the value of the divided part shall bear to the whole of the mortgaged property. Under sec. 7 of 37 & 38 Vict. c. 57, an acknowledgment to a third party is of no avail, but either the person to be paid or to pay, or their respective agents, may give an acknowledgment. An acknowledgment by one of two mortgagee trustees was held to have no effect (*Richardson* v. *Younge*, 1871, L. R. 6 Ch. 478). See Chitty's *Statutes, Limitation*, p. 50. See also *In re England*, [1895] 2 Ch. 820; *In re Allen; Bassett* v. *Allen*, [1898] 2 Ch. 499; and LIMITATION.

Mortgages and Legacies.—Sec. 40 of 3 & 4 Will IV. c. 27, now also repealed by 37 & 38 Vict. c. 57, was another section applying to mortgages, similar to sec. 8 of the later Act, except that twelve years was substituted for twenty years by the 8th section, which enacted: That no action, suit, or proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge or release of the same, unless in the meantime some part of the principal money or interest shall have been paid, or some *acknowledgment* of the right thereto shall have been given in writing, signed by the person to whom the same shall be payable, or his agent, to the person entitled, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payments or acknowledgments, or the last of such payments or acknowledgments, if more than one, was given.

It has been decided on this section that the limit of twelve years

applies to the personal remedy on the covenant in a mortgage deed (*Sutton* v. *Sutton*, 1882, 22 Ch. D. 511), and also to a remedy on a collateral bond (*Fearnside* v. *Flint*, 1882, 22 Ch. D. 579). See also Chitty's *Statutes, Limitation*, pp. 52-4; Darby and Bosanquet, p. 221 *et seq.*

Arrears of Rent or Interest on Charges.—By the same Act of 1833, s. 42, it was enacted that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears or interest, shall be recovered but within six years next after the same respectively shall have become due, or next after an *acknowledgment* of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. An acknowledgment by one of two executors and devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mortgage created by their testator, cannot be treated as the valid act of the two in their capacity of trustees, and is not a good acknowledgment within this section (*Astbury* v. *Astbury*, [1898] 2 Ch. 111). The section also contained a proviso as to the case of a prior incumbrancer being in possession.

In this case the agents of either party may give an acknowledgment. For cases, Chitty's *Statutes, Limitation*, p. 36; Darby and Bosanquet, p. 220 *et seq.*

Rent or Specialities.—The Civil Procedure Act, 1833, 3 & 4 Will. IV. c. 42, providing twenty years' limitation for actions for rent on an indenture of demise, on specialities or recognisances, enacted by sec. 5, that if any *acknowledgment* should have been made, either by writing signed by the party liable, or his agent, the person entitled to such actions might bring his action for the money remaining unpaid and so *acknowledged* to be due within twenty years after such acknowledgment by writing, or in case the person entitled to such action shall at the time of such acknowledgment be under such disability, or the party making such acknowledgment were, at the time of making the same, beyond the seas, then within twenty years after such disability had ceased, or the party's return. See ABSENCE BEYOND SEAS.

The effect of an acknowledgment under this Act is not the same as under the Limitation Act of 1863. An admission, even to a stranger, is sufficient (*Moodie* v. *Bannister*, 1859, 4 Drew, 432; 62 E. R. 166). See Chitty's *Statutes, Limitation*, p. 40; Darby and Bosanquet, p. 155.

Intestates' Estates.—The Law of Property Amendment Act, 1860, 23 & 24 Vict. c. 38, provides (s. 13) for the limitation of twenty years in cases of claims to the personal estates of intestates, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some *acknowledgment* of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of them if more than one, was made or given.

The acknowledgment may be made by the person accountable, or his agent, to the person entitled, or his agent (see Banning, p. 235; Darby and Bosanquet, p. 172).

For acknowledgment by part payment, see LIMITATION.

PRECEDENT.

ACKNOWLEDGMENT of TITLE *so as to bar the* STATUTES *of* LIMITATIONS.[1]

I [*occupant*], of, &c., do hereby admit and declare that I am now in possession [*or* in receipt of the rents and profits of], all that messuage, &c. [*describe parcels*], with the appurtenances, situate at in the county of , by the sufferance and permission of , of , esquire, and subject to the title of the said , under whom I now hold the same.

Dated this day of , 18 .

To , esquire. [*Signature of Occupant.*]

[1] No stamp is required: *Barry* v. *Goodman*, 2 M. & W. 768.

Acknowledgment of Deeds.—All deeds purporting to dispose of any estate or interest in the land or in any reversionary interest in personal property of a married woman married before the 1st January 1883, must, unless (see HUSBAND AND WIFE) (*a*) she is entitled thereto for her separate use, or (*b*) her title thereto has accrued since that date (*In re Harris*, 1884, 28 Ch. D. 171), be executed by her and her husband, and acknowledged by her in accordance with the provisions of the Fines and Recoveries Act, 3 & 4 Will. IV. c. 74, and sec. 7 of the Conveyancing Act, 1882, 45 & 46 Vict. c. 39, and rules made thereunder. See ABSTRACT OF TITLE.

Sec. 77 of the former Act provided that no deed executed under that Act by a married woman, effecting any disposition, release, surrender, or extinguishment of any estate in lands of any tenure, or in any money subject to be invested in the purchase of lands, or the release or extinguishment of any power which a married woman had over such lands or money, should be valid and effectual unless the husband concurred in the deed, and unless the deed were acknowledged by her as thereafter directed. Legal estates in copyholds are excluded where, previously, surrender had been effected by the wife in concurrence with the husband, but an examination and acknowledgment are required in the case of equitable estates in copyholds (s. 90). By the Real Property Act, 1845, 8 & 9 Vict. c. 106, these provisions were extended to dispositions of contingent and other like interests which were thereby made alienable, and to disclaimers of estates, or interests in land, by married women. The Act of 1857, 20 & 21 Vict. c. 56 (Malins' Act), enabled married women to dispose of reversionary interests in personal estate (with certain exceptions, notably personal estate to which she is entitled under her marriage settlement), and provided that every deed thereunder should be acknowledged in the manner prescribed in and by the Fines and Recoveries Act.

Every deed executed by a married woman under the above-mentioned enactments (except as protector of a settlement) must, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of (now) the High Court (s. 79 of the Fines and Recoveries Act), or a County Court judge (County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 184), or before one of the Perpetual Commissioners appointed for this purpose by the Lord Chief Justice of England (Judica-

ture Act, 1881, s. 26), or a Special Commissioner to be appointed by the Court. The Perpetual Commissioners are appointed for each county, from such proper persons as the Lord Chief Justice shall think fit (usually, but not necessarily, solicitors). A Divisional Court has held that the Commissioner can only act in the county for which he is appointed (*In re Jane Read*, 1877, W. N. 117); but in *Blackmur* v. *Blackmur*, 1876, 3 Ch. D. 633, Jessel, M.R., held that the Commissioner need not be appointed for the county in which the acknowledgment is taken (see s. 81 of the Fines and Recoveries Act).

A Special Commissioner is appointed where, by residence beyond seas, or ill-health, or any other sufficient cause, the acknowledgment cannot be made in the ordinary manner (s. 83).

Before receiving the acknowledgment, the Commissioner must examine the married woman, apart from her husband, touching her knowledge of such deed, and ascertain whether she freely and voluntarily consents to it; and unless she does, shall not permit her to acknowledge it; and in such case the deed, so far as relates to the execution thereof by her, is void (s. 80). Sec. 7 of the Conveyancing Act, 1882, provides that interest as party, solicitor to one of the parties, or clerk to such solicitor, shall not invalidate the acknowledgment. The rules direct that a declaration shall be made that the Commissioner has no such interest, and that such declaration shall be added to the memorandum of acknowledgment. But this, and the further direction that the Commissioner shall examine as to whether the married woman intends to give up her interest without having any provision made for her, are by the sixth rule declared not to invalidate the acknowledgment.

The memorandum of acknowledgment, which must be signed by the Commissioner, certifies specifically that the examination has been made in accordance with the Act, and is to be in the form prescribed by the rules.

Prior to the Conveyancing Act, 1882, which provides that the deed shall take effect, as regards the execution thereof by the married woman, at the time of acknowledgment (s. 7), it was necessary to file a separate certificate in the Common Pleas or the High Court, and thereupon the deed took effect from the date of the acknowledgment (sec. 86 of Fines and Recoveries Act). The sections of the latter Act relating to certificates are repealed; but sub-secs. (6) and (7) of the above-mentioned sec. 7 enact that if a deed were executed before the first of January 1883, a certificate of an acknowledgment, whether made before or after that date, must be filed, as theretofore, in the central office, where the index of certificates is still kept and may be searched.

The execution of a power does not require acknowledgment (Sugden, *Powers*, p. 153, 8th ed.; Farw., *Powers*, 2nd ed., p. 117).

The Lord Chancellor cannot dispense with the necessity of acknowledgment by a lunatic married woman, and can only vest in the purchaser an equitable fee binding on herself and her heir (*In re Stables*, 1864, 4 De G., J. & S. 257; 46 E. R. 917).

A married woman, in order to exercise the powers given to a tenant for life under the Settled Land Act, 1882, without acknowledgment, where the marriage and the settlement were before 1883, must be entitled for her separate use (s. 61; and see Wolstenholme and Brunton's *Conveyancing Acts*, p. 317*n*).

A contract by a woman married before 1883, for the sale of land, is

enforceable if made by deed acknowledged (*Crofts* v. *Middleton*, 1856, 8 De G., M. & G. 192; 44 E. R. 364).

The proceeds of sale of real estate, and a mortgage debt on real estate (*Williams* v. *Cooke*, 1863, 4 Gif. 343), which, in the words of the 77th section of the Fines and Recoveries Act, the married woman alone, or she and her husband in her right, may have, must be disposed of by acknowledged deed; but this does not include a reversionary interest in a mortgage debt which is part of a residue belonging to trustees, and to which other parties as well as husband and wife are entitled (*In re Newton's Trusts*, 1882, 23 Ch. D. 181, where the deed was executed before Malins' Act).

Section 91 of the Fines and Recoveries Act provides for dispensing with the concurrence of the husband in case of lunacy or idiocy, or other cause. (See Macqueen, *Husband and Wife*, 3rd ed., p. 67.)

Where a married woman is a trustee for sale of land she can only convey, notwithstanding the Married Women's Property Act, 1882, by deed acknowledged (*re Harkness*, [1896] 2 Ch. 358), though she can convey as a *feme sole* land of which she is mortgagee (*re Brooke*, [1898] 1 Ch. 647), or of which she is a bare trustee (Trustee Act, 1893, 56 & 57 Vict. c. 53, s. 16).

The Agricultural Holdings Act, 1883, s. 26, contains provisions for taking the examination of a married woman by the County Court judge, in regard to acts done by her thereunder.

[I. Byth. & Jarm., 4th ed., tit. "Acknowledgments," pp. 208, 259, 263.]

PRECEDENTS.

I. *MEMORANDUM by a* JUDGE *to be endorsed on or written at the Foot or in the Margin of a* DEED ACKNOWLEDGED *by a* MARRIED WOMAN.

Memorandum by judge.

THIS deed was this day produced before me and acknowledged by [*insert names in full of the married woman and her husband*] therein named, to be her act and deed, previous to which acknowledgment the said married woman was examined by me, separately and apart from her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her.

WITNESS my hand this day of , 18 .

(Signed) A. B.,

A judge of the High Court of Justice in England, *or* a judge of the County Court of .

II. *MEMORANDUM by a* COMMISSIONER *to be endorsed on or written at the Foot or in the Margin of a* DEED ACKNOWLEDGED *by several* MARRIED WOMEN.

Memorandum by perpetual commissioner.

THIS deed was this day produced before me and acknowledged by [*names in full of the married women and their husbands*] therein named, to be their several acts and deeds, previous to which acknowledg-

ments the said [*married women*] were examined by me separately and apart from their respective husbands touching their respective knowledge of the contents of the said deed, and their consent thereto, and each of them declared the same to be freely and
Declaration. voluntarily executed by her: AND I DECLARE that I am not interested or concerned either as a party, or as a solicitor, or clerk to a solicitor of one of the parties, or otherwise, in the transaction giving occasion for the said acknowledgment.

WITNESS my hand this day of , 18 .

(Signed) A. B.,
A perpetual commissioner for taking acknowledgments of deeds by married women.

III. *MEMORANDUM by a* SPECIAL COMMISSIONER *to be endorsed on or written at the Foot or in the Margin of a* DEED ACKNOWLEDGED *by a* MARRIED WOMAN *who is a* FOREIGNER *or* DEAF *and* DUMB.[1]

Memorandum by special commissioner. THIS deed was this day produced before me and acknowledged by [*names in full of the married woman and her husband*] therein named, to be her act and deed, previous to which acknowledgment the said [*married woman*], being an Italian [*or* being deaf and dumb], the nature, purport, and contents of the said deed were fully explained to her in my presence by C. D., being a person accustomed and competent to hold conversation in the Italian language [*or* to hold conversation by signs with the said (*married woman*), *or* with deaf and dumb persons]; and the said [*married woman*] was then also examined by me separately and apart from her husband by means of the interpretation of the said C. D., touching her knowledge of the contents of the said deed, and her consent thereto, and from the aforesaid explanation and interpreted examination, I am satisfied that the
Declaration. said married woman freely and voluntarily executed the said deed: AND I DECLARE, &c.

(Signed) A. B.,
The special commissioner appointed to take the aforesaid acknowledgment.

[1] This form is adapted from the form of certificate of acknowledgment approved by the court in the case of *Re Harper*, 6 Man. & G. 732, where the married woman was deaf and dumb. A variation from the form of memorandum prescribed by the rules does not render the acknowledgment invalid (*ante*, p. 246); and certificates being no longer required, it appears advisable that special circumstances attending the taking of the acknowledgment should be stated in the memorandum.

Acquiescence is the common element in a somewhat indefinite group of equitable estoppels, constituted by the fact that the person entitled has, as it is said, "slept upon his rights," and by his conduct at the time of a breach of them, or subsequently thereto, has, with full knowledge, both of his own rights and of the acts which infringe them,

led the persons responsible for the infringement to believe that he has waived or abandoned his rights. The terms "*laches*," "acquiescence," "standing by," and "delay" are frequently associated together, and they do not appear to be capable of distinct definition.

It is unnecessary to consider the legal effects of acquiescence, in the sense of actual consent or agreement to, or participation in, the acts which are the subject of an action by the person who complains of them, since no one can seek a remedy against another in respect of his own acts (and see LEAVE AND LICENSE). The cases to be considered are those in which the conduct relied on as acquiescence falls short of this.

"The term acquiescence must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress, or only after it has been completed. If a person, having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to it being committed, he cannot afterwards be heard to complain of the act." This, as Lord Cottenham said (*Duke of Leeds* v. *Amherst*, 1846, 2 Ph. 117; 41 E. R. 886; 78 R. R. 47), is the proper sense of the term "acquiescence," and in that sense it may be defined as *quiescence under such circumstances as that assent may be reasonably inferred from it*, and is no more than an instance of the law of estoppel by words or conduct. See ESTOPPEL. But when once the act is completed without any knowledge or (without any) assent on the part of the person whose "right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him, which at all events, as a general rule, cannot be divested without accord and satisfaction" (*q.v.*), or release under seal. Mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right, although under the name of *laches* it may afford a ground for refusing relief under particular circumstances; and it is clear that even an express promise by a person injured, that he would not take any legal proceedings to redress the injury done to him, could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding (*per* the C. A. in *De Bussche* v. *Alt*, 1878, 8 Ch. D. 286).

The doctrine formerly covered a wider area than it now does. Before the Real Property Limitation Act of 1833 for the first time introduced a statutory rule of limitation into the Court of Chancery, that Court, upon the principle embodied in the maxim, "*æquitas vigilantibus non dormientibus subvenit*," was accustomed to refuse to entertain stale claims (2 Spence, 60); but it is now settled that mere delay constitutes no defence to a legal claim, unless the statutory period of limitation has expired, although it may sometimes operate to bar a right which was recognised in equity only (see *infra*, p. 133). And, further, in cases where the plaintiff had not applied to the Court with reasonable promptitude, he was sometimes required to establish his right at law before a Court of equity would recognise it. Since the Judicature Acts, this practice has, of course, been abandoned (*Fullwood* v. *Fullwood*, 1878, 9 Ch. D. 178).

There can be no "acquiescence" without full knowledge both of the right infringed (*Willmott* v. *Barber*, 1880, 15 Ch. D. 96; *Beauchamp* v. *Winn*, 1873, L. R. 6 H. L. 223), and of the acts which constitute the infringement (*De Bussche* v. *Alt*, 1878, 8 Ch. D. 286). "Parties cannot be said to acquiesce in the claims of others unless they are fully cognisant of their right to dispute them" (*per* Turner, V.-C., in *Marker* v. *Marker*, 1851, 9 Hare, 1). Constructive notice, not amounting to actual knowledge, is not sufficient (*Willmott* v. *Barber*, 1880, 15 Ch. D. 96). Thus, in the case last cited, a claim to compel a lessor to license an assignment, in which he was alleged to have acquiesced, failed because he showed that he did not know that his consent to the assignment was required. And in *De Bussche* v. *Alt*, *supra*, where an agent for the sale of a ship bought her himself, after arranging for a re-sale at a profit, the claim of the principal to recover the profit succeeded, notwithstanding that he had agreed to the sale, and had not commenced his suit until four years after the transaction, because, when he was said to have acquiesced, he did not know the particulars of the second sale, or that it had been arranged before the first was concluded (8 Ch. D. pp. 313, 315).

It follows from this that acquiescence in proceedings that would otherwise be an actionable wrong, *e.g.* a nuisance, is no bar to a remedy for a wrong done by an unforeseen extension of the same proceedings (*Bankart* v. *Houghton*, 1860, 27 Beav. 425; 54 E. R. 167).

Acquiescence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take the steps, in the belief or expectation that the right does not exist or has been abandoned ("standing by"), or is such as to raise an inference that the parties have acted upon an agreement inconsistent with the right asserted.

The doctrine of "standing by" rests upon the ground that it is fraudulent for anyone to assert a right after having encouraged "another to act upon an expectation that it does not exist, or has been abandoned" (see *Savage* v. *Foster*, 1772, 2 White & Tudor, L. C., 7th ed., 681). This Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of "encouragement" (*per* Eldon, L.C., in *Dann* v. *Spurrier*, 1802, 7 Ves. 231; 32 E. R. 94; 6 R. R. 119). The conditions of estoppel by standing by were carefully formulated by Fry, J., in *Willmott* v. *Barber*, 1880, 15 Ch. D. 96, as follows:—

(*a*) The party who seeks to establish the estoppel must have made a mistake as to his legal rights, or there can be no estoppel. Thus in *Ramsden* v. *Dyson*, 1865, L. R. 1 H. L. 129, tenants at will who had built houses on their holdings, knowing that they had no fixed tenure, but believing that the landlord would not evict them so long as they paid the agreed rent, were held to have no claim in equity against the landlord. So in an action for infringement of a patent, a defence, on the ground that the plaintiff had known of the intention of the defendants to erect the machine in question, and had not warned them that it infringed his patent, failed, because the defendants did not show that they were ignorant of the patent or that the plaintiff supposed them to be so (*Proctor* v. *Bennis*, 1887, 36 Ch. D. 740).

(*b*) He must have acted upon the faith of his mistaken belief.

When, therefore, the defendants had attempted to illegally forfeit the share of the plaintiff in a cost-book partnership, and he had taken no action for about four years after the forfeiture, the defence of acquiescence failed, *inter alia*, because the correspondence showed that the defendants had never acted upon the belief that he had acquiesced (*Clarke* v. *Hart*, 1858, 6 H. L. C. 633; 10 E. R. 1443). But in a similar case, where the excluded partner had acquiesced for nine years and left the continuing partners to take all the risk of the business for that period, he was held to have abandoned his right (*Prendergast* v. *Turton*, 1841, 1 Y. & C. C. C. 98; 62 E. R. 807; *Clegg* v. *Edmondson*, 1857, 8 De G., M. & G. 787; 44 E. R. 593). The last-cited cases were treated as instances of abandonment in *Clarke* v. *Hart*, *supra*.

(*c*) The person estopped must have known of the existence of his own right (*Willmott* v. *Barber*, *supra*);

(*d*) And of the other party's mistaken belief of his right. If he does not, there is nothing which calls upon him to assert his right (*Proctor* v. *Bennis*, 1887, 36 Ch. D. 740). In the case last cited, the Court of Appeal held that it is not the duty of a patentee to warn intending infringers;

(*e*) Lastly, the person estopped must have encouraged the other party in the acts which he has done, either directly or by abstaining from asserting his right (*Dann* v. *Spurrier*, 1802, 7 Ves. 231; 32 E. R. 94; 6 R. R. 119; *Rochdale Canal Co.* v. *King*, 1851, 2 Sim. N. S. 78; 61 E. R. 270).

[*Civil Service Musical Instrument Association* v. *Whiteman*, 1899, 68 L. J. Ch. 484, is a recent case in which Kekewich, J., applied these conditions. It was there held that a tenant who had expended money on a passage, which was not demised to him, with the knowledge and without the interference of the landlord was entitled to an injunction restraining the landlord from interfering with his improvements. The acceptance of premiums by a life assurance company after knowledge of a mistaken statement by the assured of his age, precludes the company from repudiating or delaying payment of the policy moneys (*Hemmings* v. *Sceptre Life Association, Ltd.*, [1905] 1 Ch. 365).]

Some cases, which hardly conform to the conditions set out above, may be best explained, perhaps, as resting upon implied agreement. In *Powell* v. *Thomas*, 1848, 6 Hare, 300, a colliery proprietor wrote to a landowner, over whose land he desired to carry a railway, offering to pay for the land required, according to a fair valuation. No reply was sent, but the railway was made without objection, and the price to be paid was subsequently discussed, but not agreed upon. Some years later, when the landowner sought to eject the colliery proprietor, he was restrained from doing so, upon the full value of the land being paid into Court. Under similar circumstances, the Court inferred an agreement by a railway company, that the owner of a shipyard who had made a tunnel and siding to their line should have the use of it, paying toll, so long as he owned the yard (*Laird* v. *Birkenhead Railway Co.*, 1859, 29 L. J. Ch. 218). *Thomas* v. *Atherton*, 1877, 10 Ch. D. 185, is another instance. There, parties to a dispute, who had not actually consented to a reference, attended at and took part in the arbitration, and it was held that they were bound by the award.

Such an implied agreement, where the consideration on one side has been executed, will be binding, notwithstanding that ordinarily the party

bound can only contract under seal (*Crook* v. *Corporation of Seaford*, 1871, L. R. 6 Ch. 551), or in some other formal manner (*Laird* v. *Birkenhead Railway Co., supra*).

It has been said to be an element in these cases, that the matter acquiesced in shall be of great value to the other party (see *per* James, V.-C., in *Bankart* v. *Tennant*, 1870, L. R. 10 Eq. 141). But this does not seem to rest upon any intelligible principle, and the case cited was determined on the ground that there was a mutual understanding of the nature of a tenancy at will: "So long as you are good customers of ours, and are using our canal, we shall not quarrel with you about the use of water which is of no value to us." This could not be the foundation of a right to the water.

If full notice of an intended course of action is given to persons whose interests will be affected by it, who may reasonably be expected to consent, and whose consent is necessary to make it legal, they will usually be held to have given such consent if they do nothing. Upon this principle, a surrender of shares which could only be validly made with the consent of every member of the company, was upheld (*Evans* v. *Smallcombe*, 1868, L. R. 3 H. L. 249). Lord Cairns said in the case just cited: "If by 'acquiescence' is meant a course of conduct which amounts to active and intelligent consent, I think it is very likely that many of those shareholders could not be held to have actively or intelligently consented to what was going on. . . . If they had notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given." As to the circumstances under which shareholders can be held to have had such knowledge of acts of directors which are *ultra vires*, as by their "acquiescence" to have all agreed to them, see *Houldsworth* v. *Evans*, 1868, L. R. 3 H. L. 263, and the cases collected in Buckley on *Companies* in the notes to Table A, arts. 19 and 55. (See also *Proctor* v. *Bennis*, cited *supra*, and *Darnley* v. *London, Chatham, and Dover Railway Co., infra.*) [The fact that a man does not answer a letter is not evidence that he acquiesces thereto, "unless there are circumstances which render it more reasonably probable that he would answer the charge made against him than that he would not" (*per* Bowen, L.J., in *Wiedeman* v. *Walpole*, [1891] 2 Q. B. 539). In commercial matters, under some circumstances, the failure to answer a letter amounts to an admission of the truth of its contents (*ibid.*); and see the cases on this point collected, Roscoe, *Nisi Prius*, 17th ed., 1900, pp. 64, 65, and also *Keen* v. *Priest*, 1853, 1 F. & F. 314.]

Acquiescence may effect a variation of the terms of a contract, either by being equivalent to acceptance of a substituted performance (*Watts* v. *Hyde*, 1848, 17 L. J. Ch. 409), or being such conduct as justifies one party in believing that the other has waived a term he was entitled to insist upon (*per* Lord Cranworth in *Darnley* v. *London, Chatham, and Dover Railway Co.*, 1867, L. R. 2 H. L. at p. 60). In the case cited, Chelmsford, L.C., said: "A waiver must be an intentional act with knowledge" (p. 57); but it is submitted that Lord Cranworth's test, provided of course that the party barred knew that the other believed the term was waived, is the true rule, for an expectation knowingly encouraged by the party affected will be treated as an agreement as

against him (see *per* Lord Kingsdown in *Ramsden* v. *Dyson*, 1865, L. R. 1 H. L. 129). As to waiver of restrictive covenants, see below.

The acts which are relied on as indicating a consent to the variation, or a waiver, of a person's rights under a contract, must be clearly referable to the matter in question. Where, therefore, a tenant who had agreed to take a lease of cellars, if they were made dry, took possession and paid rent for two years, although the work had not been done, relying upon the landlord's promise to do it, it was held that the payment of rent ought to be treated as made only in respect of his use and occupation, and that he had not waived performance of the stipulation (*Lamare* v. *Dixon*, 1873, L. R. 6 H. L. 414).

In cases of equitable claims, staleness of demand as distinguished from the Statute of Limitations, and analogy to it, may furnish a defence (*per* Lindley, L.J., *In re Sharpe*, [1892] 1 Ch. at p. 168). Where it would be *practically unjust* to give a remedy, either because the party has by his conduct done that which might justly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him, if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Lindsay Petroleum Co.* v. *Hurd*, 1874, L. R. 5 P. C. 221). No more distinct rule can be laid down (*per* Lord Blackburn in *Erlanger* v. *New Sombrero Phosphate Co.*, 1878, 3 App. Cas. 1218). [See also *In re Gallard*, [1897] 2 Q. B. 8; *Rochefoucauld* v. *Bousfield*, [1897] 1 Ch. 196.]

If the defendant has not been prejudiced by the delay, and it is either not excessively long, or is explained, it constitutes no bar (*re Sharpe*, *supra*; *Clarke* v. *Edmondson*, *supra*), at least, unless the delay is so great as to raise a presumption of release (see Lewin on *Trusts*, 11th ed., pp. 1082 *et seq*).

In cases of *fraud* it must appear that the party defrauded knowingly forbore to assert his right (*Lindsay Petroleum Co.* v. *Hurd*, *supra*; and see *Gibbs* v. *Guild*, 1882, 9 Q. B. D. 59).

The following are examples of equitable claims to which this defence has been pleaded: To upset purchases by a trustee (see Lewin, 11th ed., p. 574), or by a solicitor from his client (*Austin* v. *Chambers*, 1837, 6 Cl. & Fin. 1; 7 E. R. 598; 49 R. R. 1—a delay of ten years; *Gresley* v. *Monsley*, 1859, 4 De G. & J. 78; 45 E. R. 31—a delay of eighteen years, during which, however, the solicitor continued to act—in both cases the defence failed; to fix a defendant with a constructive trust (*Clegg* v. *Edmondson*, 1857, 8 De G., M. & G. 787; 44 E. R. 593); to make legatees refund to creditors (*Ridgway* v. *Newstead*, 1860, 2 Gif. 492; *Blake* v. *Gale*, 1886, 32 Ch. D. 571).

Settlements long acquiesced in will not be disturbed (*Bright* v. *Legerton*, 1860, 6 Jur. N. S. 1179), unless there is a *legal* right, *e.g.* under the Statute 27 Eliz. c. 5, *re Maddever*, 1884, 27 Ch. D. 523. So, where a post-nuptial settlement of a reversion was left unchallenged by the settlor, after she became a widow, it was held to be binding on her after her re-marriage (*Ashton* v. *Macdougall*, 1842, 5 Beav. 56; 49 E. R. 497;

59 R. R. 414); and if payments are made for years, upon a mistaken construction of a settlement, or other mistake as to equitable right, and are acquiesced in by all parties, they cannot afterwards be recovered from the payees (*Bate* v. *Hooper*, 1855, 5 De G., M. & G. 338; 43 E. R. 901; *Stafford* v. *Stafford*, 1857, 1 De G. & J. 193; 44 E. R. 697).

Claims in respect of breaches of trust must be promptly put forward when the facts are known to persons of full age (*Walker* v. *Symmonds*, 1818, 3 Swan. 1; 36 E. R. 751; 19 R. R. 155; Lewin, 11th ed., p. 1172) who are entitled in possession (*Life Association of Scotland* v. *Siddall*, 1861, 3 De G., F. & J. 58; 45 E. R. 800). Formerly, mere delay was no bar in cases of express trust, unless so great as to raise a presumption of release; but by the Trustee Act, 1888, s. 3, a trustee can now plead the Statutes of Limitation, unless the breach of trust was fraudulent or he has retained the proceeds of trust property. No shorter period of delay than that prescribed in analogous cases by the statute bars a claim in respect of breach of trust as "stale," where delay alone and no active acquiescence is relied on (see *re Sharpe*, [1892] 1 Ch. 154).

Upon applications to rescind agreements to take shares in joint-stock companies, or to remove the applicant's name from the register, in the interests of other shareholders and of creditors of the company, the rule requiring that the application for relief shall be made promptly after the applicant has knowledge of his right, is strictly applied (see *Ashley's Case*, 1870, L. R. 9 Eq. 263; *Downes* v. *Ship*, 1868, L. R. 3 H. L. 343), and, apart from any question of delay, if the applicant continues to act as a shareholder after he knows the fact, his claim will be barred (*Sharpley* v. *Louth and East Coast Railway Co.*, 1876, 2 Ch. D. 663). The authorities on this head will be found in Buckley on *Companies* under sec. 35 of the Companies Act, 1862.

Without wholly barring a right, acquiescence may cause the Court to refuse the special forms of equitable relief, such as specific performance (Lewin, 11th ed., p. 1093; Fry, 4th ed., p. 476), or injunction.

The grant or refusal of interlocutory injunctions is chiefly affected by considerations of convenience, and anything in the nature of delay or acquiescence will usually be a bar (see *Johnson* v. *Wyatt*, 1863, 2 De G., J. & S. 18; 46 E. R. 281).

At the trial, if the plaintiff has a legal right, mere delay in enforcing it will not prevent the grant of an injunction (*per* Fry, J., in *Fullwood* v. *Fullwood*, 1878, 9 Ch. D. 178), but acquiescence in the breach of the right may cause the Court to give damages instead of an injunction (*per* Fry, L.J., in *Sayers* v. *Collyer*, 1884, 28 Ch. D. 110), probably because the plaintiff's conduct shows that the breach is not important to him, and may be compensated by damages (see *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287), and anything like acquiescence, or even delay to take proceedings or give notice of objection (*Von Joel* v. *Hornsey*, [1895] 2 Ch. 774), after the plaintiff is aware that the defendant's operations will interfere with his right, would be a bar to a mandatory injunction (see INJUNCTION), if the injunction would occasion great loss to the defendant (*Baxter* v. *Bower*, 1875, 44 L. J. Ch. 625; *Cooper* v. *Hubbuck*, 1860, 30 Beav. 160; 54 E. R. 849).

Acquiescence is frequently pleaded as a defence to actions to enforce restrictive covenants. In *Sayers* v. *Collyer*, 1884, 28 Ch. D. 103, the covenant was not to carry on a trade, and the plaintiff, who had known

of the opening of a beer shop by the defendant for three years before the action, and had himself bought beer at the shop, was held to be disentitled to relief. [See also *Gibson* v. *Doeg*, 1857, 2 H. & N. 615, which case was followed in *In re Summerson*, [1900] 1 Ch. 112*n*., and *Hepworth* v. *Pickles*, [1900] 1 Ch. 108.] If a person entitled to insist upon such covenants allows the subject-matter to be so changed that they no longer serve any beneficial purpose, he cannot obtain equitable, as distinguished from legal, relief in aid of his rights, but waiver in respect of trifling breaches, or in a few particular instances, will not operate as a general bar (see *Knight* v. *Simmonds*, [1896] 2 Ch. 294, and the cases there cited).

As to acquiescence in infringements of patents, see *Neilson* v. *Thompson*, 1841, 1 Web. P. C. 278, and *Proctor* v. *Bennis*, 1887, 36 Ch. D. 740; trade marks, *Mouson* v. *Boehm*, 1884, 26 Ch. D. 398, and *Marquis of Londonderry* v. *Russel*, 1886, 3 T. L. R. 360; copyright, *Hogg* v. *Scott*, 1874, L. R. 18 Eq. 444; nuisance, *Bankart* v. *Houghton*, 1859, 27 Beav. 425; 54 E. R. 167, and *Wicks* v. *Hunt*, 1859, John. 372.

A continual claim (*Lehmann* v. *Macarthur*, 1868, L. R. 3 Ch. 496), or mere notice of objection (*Clegg* v. *Edmondson*, 1857, 8 De G., M. & G. 787; 44 E. R. 593; *Wicks* v. *Hunt*, *supra*; *Parrot* v. *Shellard*, 1868, 16 W. R. 928—money taken "under protest") will not keep alive claims which are abandoned by conduct.

Married women and infants are equally barred with persons *sui juris* by such acquiescence as makes the assertion of a claim fraudulent (see *Savage* v. *Foster*, 1722, and the notes thereto in 2 White & Tudor's L. C., 7th ed. 681). As regards the former, married women were, even before the Married Women's Property Acts, also held to be barred in regard to equitable claims by the lesser degrees of acquiescence which suffice to defeat such claims (*Stafford* v. *Stafford*, 1857, 1 De G. & J. 193; 44 E. R. 697; *Skottowe* v. *Williams*, 1861, 3 De G., F. & J. 535; 45 E. R. 986; *Jones* v. *Higgins*, 1866, L. R. 2 Eq. 538).

But no acts of acquiescence during coverture, where there is no question of fraud, can debar a woman from setting aside a settlement of property which she is incompetent to deal with while covert, as, for instance, reversionary personalty not being separate estate (*Ashton* v. *Macdougall*, 1842, 5 Beav. 56; 49 E. R. 497; 59 R. R. 414; *Seaton* v. *Seaton*, 1888, 13 App. Cas. 61). See HUSBAND AND WIFE.

As to acquiescence in a settlement made by the settlor when under age, see *Carter* v. *Silber*, [1892] 2 Ch. 278; affirmed, [1893] App. Cas. 360.

[As to *laches* on part of plaintiff in an action to obtain revocation of letters of administration, see *Mohan* v. *Broughton*, 1899, 68 L. J. P. 91; and as to delay till a contract had been entered into in taking proceedings against a public body to prevent their spending money on objects alleged to be *ultra vires*, see *Roberts* v. *Ereaut*, [1905] A. C. 61.]

Acquire.—Meaning of, in Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85. By sec. 25, in every case of a judicial separation, the wife, from the date of the sentence and whilst the separation continues, is to be considered as a *feme sole* with reference to property of every description which she may acquire or which may come to or devolve upon her.

If a reversionary interest belonging to the wife before the desertion

or before the decree of judicial separation was pronounced falls into possession while the decree or protection order is in force, the wife is entitled to it as though she were a *feme sole*, and that as against the husband's assignee if the fund was not reduced into possession at the date of the decree (*In re Insole*, 1865, L. R. 1 Eq. 470; *In re Emery's Trusts*, 1884, 50 L. T. 197). Where a married woman, entitled to a legacy charged on real estate which had not been reduced into possession by her husband, obtained a protection order, in consequence of her husband's desertion, it was held that the legacy, on being paid to her after the date of the order, was property which then came to or devolved upon her (*In re Coward & Adam's Purchase*, 1875, L. R. 20 Eq. 179).

A wife who has obtained a decree for judicial separation is to be considered as a *feme sole* with respect to such property only as she may acquire, or which may come to or devolve upon her after the decree. The 25th section does not apply to property to which the wife may be entitled in possession at the date of the decree (*Waite* v. *Morland*, 1888, 38 Ch. D. 135; and see *Nicholson* v. *Drury Buildings Estate Co.*, 1877, 7 Ch. D. 48; *Dawes* v. *Creyke*, 1885, 30 Ch. D. 500; *Hill* v. *Cooper*, [1893] 2 Q. B. 85. See also *In re Hughes*, [1898] 1 Ch. 529). See HUSBAND AND WIFE; JUDICIAL SEPARATION.

Acquisition of Domicile.—See DOMICILE.

Acquisition, Right of, by a State.—According to Grotius, there are three modes of acquisition by a State: (1) by occupation (*occupatione derelicti*); (2) by treaty and convention (*pactionibus*); (3) by conquest (*victoriæ jure*) (lib. ii. c. ix. s. 11, p. 338). See these headings.

Acquisition is (*a*) original; (*b*) derivative. Original acquisition includes occupation, accession, and prescription. Derivative acquisition denotes acquisitions by treaty or convention, including transfer, gift, sale, exchange, inheritance by testament or succession, and acquisitions by conquest (Phillimore, *International Law*, vol. i. ch. xii. p. 264).

Acquittal means discharge from prosecution, by order of the Court, made upon a verdict of not guilty, or a successful plea of pardon, or of autrefois acquit or convict (*q.v.*), in cases where the indictment is good in law and sufficient to support the verdict or plea. It is less correctly applied to discharge, upon failure of the prosecution on a question of law, without reference to the facts. On acquittal, an entry was made on the record *ideo consideratum est quod prædictus A. B. de præmissis eat quietus* (Hawk., P. C., bk. ii. c. 48, s. 13). Technically, at common law the right to discharge from custody did not arise till the conclusion of the sessions of the Court of trial and payment of gaol fees, but now the prisoner is entitled to be immediately set at large, and all fees for discharge are abolished (55 Geo. III. c. 50, ss. 4, 5, 9, 13; 8 & 9 Vict. c. 114). Detention after acquittal is illegal (*Mee* v. *Cruikshank*, 1902, 20 Cox C. C. 210). Acquittal is a bar to any subsequent prosecution for the same offence (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 33; 1 Russ. on *Crimes*, 5th ed., 38-49; Arch. Cr. Pl., 23rd ed., 169-174; 1 Stephen, *Hist. of Crim. Law*, 457).

On acquittal, the accused seems to be entitled to a copy of his

indictment (Arch. Cr. Pl., 23rd ed., 228; 3 Russ. on *Crimes*, 6th ed., 463*n*). In proceedings before a Court of summary jurisdiction, the dismissal of the charge is effected by order, in the form prescribed by the Summary Jurisdiction Rules, 1886, No. 21. Where the proceeding is for a common assault, instituted by or on behalf of the person assaulted, the defendant, on dismissal of the charge on the merits, is entitled to a certificate of dismissal forthwith, *i.e.* as soon as he asks for it (24 & 25 Vict. c. 100, ss. 42-45), which protects him from all other proceedings, civil or criminal, in respect of the assault (*Costar* v. *Hetherington*, 1859, 1 E. & E. 802; *Reed* v. *Nutt*, 1890, 24 Q. B. D. 669; *R.* v. *Miles*, 1890, 24 Q. B. D. 423). See also AUTREFOIS ACQUIT.

Acquittance.—A release or written discharge of a sum of money or debt due, as where a man is bound to pay money on a bond, or rent reserved upon a lease, and the party to whom it is due, on receipt thereof, gives a writing under his hand witnessing that he is paid; this will be such a discharge in law that he cannot demand and recover the sum or duty again if the acquittance be produced (*Termes de la Ley*, 15). By sec. 23 of 24 & 25 Vict. c. 98, it is a felony to forge an acquittance or receipt with intent to defraud.

Acreage, Description by.—If one sells land, and is obliged that it containeth twenty acres, this shall be according to the law, and not according to the custom of the country (Gawdy, J., in *Wing* v. *Earle*, 34 Eliz. 1620, 267).

In *O'Donnell* v. *O'Donnell*, 1878, 1 L. R. Ir. 284, a testator devised "forty-five acres of certain lands to A., and fifty acres of the same lands to B." It was held that extrinsic evidence was not admissible to show that the testator meant Irish and not statute acres; that by the statutory definition contained in the 5 Geo. IV. c. 74, s. 2 (now repealed by the Weights and Measures Act, 1878), the word acre had received a legal signification, which must be attributed to that word whether used in a will or other voluntary instrument, or in a contract.

By sec. 2 of 41 & 42 Vict. c. 49 (Weights and Measures Act, 1878) an acre is to contain 4840 square yards. It is not clear whether a contract for the sale of land by the customary acre is affected by this statute. It is probable that such a contract is lawful (*Giles* v. *Jones*, 1856, 11 Ex. Rep. 393; Elph. 558).

Act.—See JURISPRUDENCE.

Act in Pais (French *pais* or *pays*, the country).—A term used to denote a fact which lies within the cognizance of "the country," *i.e.* a jury, as opposed to matters contained in a record or a deed. In the old law the phrase was sometimes used to distinguish conveyances made otherwise than by record, that is, assurances "transacted between two or more private persons *in pais*, in the country, that is (according to the old Roman law) upon the very spot to be transferred" (2 Black. *Com.* 294); but more frequently the term has been employed in connection with the law of estoppel to signify an act which raises an estoppel otherwise than by record or by deed. [See Co. Litt. 352*a*; *Lyon* v. *Reed*, 1844, 13 Mee. & W. 309; 67 R. R. 611.] See ESTOPPEL.

Act of Attainder.—See ATTAINDER.

Act of Bankruptcy.—See BANKRUPTCY.

Act of God.—An expression in the law, descriptive of events which cannot be foreseen, or which, if they can be foreseen, cannot be guarded against (*R.* v. *Commissioners of Sewers for Essex*, 1885, 14 Q. B. D. 574); an act of nature direct, violent, sudden, and irresistible, such as storms, tempests, and lightning (*Nugent* v. *Smith*, 1879, 1 C. P. D. 423). An extraordinary fall of snow or rain (*Nichols* v. *Marsland*, 1876, 2 Ex. D. 1), an extraordinarily high tide (*Nitro-phosphate Manure Co.* v. *London & St. Katharine's Docks Co.*, 1877-78, 9 Ch. D. 503), and an extraordinarily severe frost (*Blyth* v. *Birmingham Waterworks Co.*, 1856, 11 Ex. Rep. 781; 25 L. J. Ex. 212), such as could not have been reasonably foreseen and guarded against, are held to be exceptional events of this kind, but not a fog which is an ordinary peril of navigation (*Liver Alkali Co.* v. *Johnson*, 1874, L. R. 9 Ex. 338; *Hill* v. *Scott*, [1895] 2 Q. B. 371). The term "act of God" is not synonymous with that of "inevitable accident" (*Forward* v. *Pittard*, 1785, 1 T. R. 27; 1 R. R. 142). See ACCIDENT. All causes of inevitable accident may be divided into two classes: Those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause; and those which have their origin, either in the whole or in part, in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. The term "act of God" is applicable only to the former class (*Nugent* v. *Smith*, *supra*). Nor must cases in which a contract is discharged by the occurrence of an act of God, be confused with those in which the discharge takes place through a subsequent impossibility of performance, not expressly provided against in the terms of the contract (Anson, *Law of Contract*, 10th ed., 1903, p. 298). When the law creates a duty, and the party is disabled from performing it, without any default of his own, by the act of God, the law will excuse him; but where a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity (*per* Mellish, L.J., *Nichols* v. *Marsland*, 1875, L. R. 10 Ex. 255).

The act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, when it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract (*per. cur.* in *Baily* v. *De Crespigny*, 1869, L. R. 4 Q. B. 180).

A common carrier is liable to the owner for the loss of or damage to goods bailed to him for carriage, but he is discharged if he can show that an act of nature proved the sole, direct, and irresistible cause of the loss. In order to show that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution, under the circumstances, could it have been prevented (*Nugent* v. *Smith*, *supra*).

One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable to an action for an escape of the

water which injures his neighbour, if the escape be caused by an act of God, in the sense that it is practically, though not physically, impossible to resist it (*Nichols* v. *Marsland, supra*). If a sea bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the liability to repair the damage thus caused to the wall falls not upon the owner but upon the whole of the level (*R.* v. *Somerset*, 1799, 8 T. R. 312; 4 R. R. 659; *Keighley's Case*, 1609, 10 Rep. 139; *Commissioners of Sewers for Fobbing* v. *R.*, 1886, 11 App. Cas. 449; see generally Broom's *Legal Maxims*, 5th ed., 230; Beven, 2nd ed., 1895, *Negligence in Law*, vol. i. pp. 91-93).

Act of Parliament.—Statutes or Acts of Parliament are made by the King's Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in Parliament assembled. (See Black, *Com.* i. 85; *Prince's Case*, 8 Co. Rep. 20).

The Statute *Revocatio novarum Ordinationum* (15 Edw. II.) provides that laws are to be made in Parliament by the king and by the assent of the prelates, earls and barons, and the commonalty of the realm.

The royal assent to a bill is given by the sovereign in person or by commission. If the royal assent is given by commission, it can only be given to such bills as are included in a schedule annexed to the commission.

Formal promulgation is not necessary to make an Act binding. An Act comes into force on the day it receives the royal assent.

Where the commencement of an Act is not provided for in the Act itself, the date endorsed on the Act, stating when it has passed and received the royal assent, is the date of its commencement (see 33 Geo. III. c. 13).

Where an Act, passed after the 1st of January 1890, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 36.

Acts of Parliament may be repealed expressly or by implication. Where an Act passed after the year 1850 repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment. And where an Act, passed after the year 1850, repeals wholly or partially any former enactment, and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into operation. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 11.

Acts of Parliament may be classified as follows:—

1. Public Acts—
   - (*a*) General, *i.e.* with reference to the whole empire, or one of its main subdivisions;
   - (*b*) Local, *i.e.* relating to a subordinate area in a constituent part;
   - (*c*) Personal, *i.e.* relating to incorporations of trading bodies, etc.
2. Private Acts, relating to the affairs of individuals—
   - (*a*) Printed;
   - (*b*) Not printed.

See Adoptive Act.

Every Act passed after the year 1850 is a public Act, and has to be judicially noticed as such, unless the contrary is expressly provided by the Act. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 9.

The Interpretation Act, 1889, provides as follows for the citation of Acts of Parliament:—In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed; and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require; and where there are more chapters than one, by reference to the chapter; and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment is contained. See Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 35.

The Short Titles Act, 1896, c. 14, provides short or collective titles for a large number of Acts.

A number of words used in Acts of Parliament are defined by the Interpretation Act, 1889, 52 & 53 Vict. c. 63.

England in an Act of Parliament includes Wales and Berwick-upon-Tweed (see 20 Geo. III. c. 42, s. 3).

An expression of time in Act of Parliament in the case of Great Britain means Greenwich mean time. See Statutes (Definition of Time) Act, 1880, c. 9.

Several Acts are continued by the Expiring Laws Continuance Act, which is passed every year.

The Rules Publication Act, 1893, provides for the making of statutory rules under an Act of Parliament. See RULES.

The revised editions of the statutes are based on the edition of the Record Commissioners, known as the Statutes of the Realm, which commence with the provisions of Merton in the 20th year of Hen. III. (1235-36), and extend to the end of the reign of Queen Anne (13 Anne).

Statutes subsequent to that date up to the 10th Geo. III. (A.D. 1770) are printed from the Queen's printers' folio copies, the numbering of chapters and sections and the marginal notes (subject to some corrections) having been supplied, when wanting in those copies, from Ruffhead's edition. For the period from the 11th Geo. III. (A.D. 1770) to the end of the last Parliament of Great Britain in 41 Geo. III. (A.D. 1800), the text followed is that of the original King's printers' copies of the Acts, but the marginal notes are revised.

[Enactments by Colonial legislative bodies are termed Acts in the self-governing Colonies, and Ordinances in most of the other Colonies. Short titles are generally prescribed by such enactments themselves. In lieu of, or in addition to, a short title, a Colonial law is usually cited by its number and the regnal year in which it was passed, *e.g.* Ordinance No. 1 of 1889.]

[See *Statutes of the Realm; Revised Statutes; Annual Volumes of Statutes; Chronological Table and Index of the Statutes;* Hardcastle, *Statute Law;* Maxwell on the *Interpretation of Statutes;* Dwarris on *Statutes;* Chitty, *Statutes;* Strickland, *Chronological Table of Public General Acts in Force.*]

Act of Settlement.—The Statute 12 & 13 Will. III. c. 2, is

properly styled "An Act for the further limitation of the Crown and better securing the rights and liberties of the subject."

Like the Bill of Rights, the Act of Settlement deals with three topics—a settlement of the succession to the Crown; a statement of the conditions under which the Crown may be held; a variety of constitutional provisions. Only, in the Bill of Rights, these last profess to declare existing rights and liberties; in the Act of Settlement they make avowed changes in the law.

The Act consists of four clauses. The first makes a settlement of the Crown supplementary to that of the Bill of Rights. The second re-enacts the conditions, as regards religion, upon which the Crown may be held. The third (1) provides a further security that the sovereign shall be in communion with the Church of England; (2) guards against the results of the king of England being a foreigner; (3) endeavours to secure the responsibility of ministers, and the independence of the House of Commons and the judicial Bench. The fourth re-enacts and confirms all laws for the security of the established religion, and the rights and liberties of the people.

1. It was necessary that the Parliament which met on February 6, 1700-1, should re-settle the succession to the Crown. The Bill of Rights had contemplated heirs of the body of Mary, of Anne, or of William; but Mary died in 1694; and the young Duke of Gloucester, the only survivor of Anne's many children, died in 1700. The limitations of 1689 were clearly insufficient. The Act of Settlement, s. 1, recites those limitations, the death of Queen Mary and of William Duke of Gloucester, and the risk of a failure in the line of succession; it then enacts that, after the death of William and of Anne, and in default of issue of either, Sophia, Electress and Duchess-Dowager of Hanover, daughter of Elizabeth, Queen of Bohemia, and grand-daughter of James I., is next in succession in the Protestant line to the imperial crown and dignity; and that from and after the deaths of William and Anne without issue, the crown and regal government of these realms shall remain and continue to the said Sophia and the heirs of her body, being Protestants. Such was the Settlement.

2. Sec. 2, like the Bill of Rights, provides for the forfeiture of the Crown, if the holder of it is reconciled to, or enters into communion with, the See of Rome, or marries a Papist. He or she must take the coronation oath, and make the declaration against the doctrine of transubstantiation.

3. Sec. 3 deals with several matters. (*a*) The Bill of Rights had provided only against the influence of the Church of Rome; now the possessor of the Crown must join in communion with the Church of England, as by law established.

(*b*) If the king of this country was a foreigner, the nation was not to be involved in war for the defence of foreign dominions of the king "without the consent of Parliament." No statute could provide against the complications of our foreign policy which must necessarily arise when our king is also a foreign sovereign.

(*c*) The holder of the Crown might not leave the dominions of England, Scotland or Ireland without consent of Parliament. This provision was repealed almost immediately after it came into force by Geo. I. st. 2, c. 51, in its turn repealed by the Statute Law Revision Act, 1867.

(*d*) "All matters and things relating to the well-governing of the king-

dom, which are properly cognisable in the Privy Council by the laws and customs of this realm, should be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same." This struck at the practice, then becoming settled, of determining matters of State policy at meetings of an inner council, of whose proceedings no record was kept, of whose existence the law took no cognisance. See CABINET. Here the departments of government were set in motion, while to the Privy Council were left such matters only as needed the formal assent of the Crown in Council. Long before the Act came into force, it was plain that executive business could not be settled by a large body of diverse political opinions, nor could responsibility be thus fixed on the individual members of such a body. The provision was repealed by 4 & 5 Anne, c. 29, s. 27.

No person born out of the United Kingdom or its dominions, though naturalised or made a denizen (*q.v.*), is capable of being in the Privy Council or either House of Parliament, or holding any office or place of trust, civil or military, or having a grant of lands or hereditaments made to him, or in trust for him by the Crown. These disabilities were modified by 7 & 8 Vict. c. 66, while by 33 & 34 Vict. c. 14, an alien (*q.v.*) has all the proprietary rights of a British subject, save as to the ownership of a British ship, and a naturalised alien is for all purposes, proprietary and political, a British subject.

Persons holding office or place of profit under the king, or pension from the Crown, were disabled from sitting in the House of Commons. The exclusion of the ministers of the Crown from place or voice among the representatives of the people would have been the result of this attempt to secure the independence of the House of Commons. The provision was repealed by 4 & 5 Anne, c. 20, s. 28, a step was made towards putting the matter on a reasonable footing by the Place Bill of 1707, and the subject has been dealt with in a series of statutes designed to secure the independence of the House of Commons, the freedom of the Civil Service from political influence, and the all-important principle that the political chiefs of the great departments of government should be present in and directly responsible to Parliament.

Judges' commissions were to be made *quamdiu bene se gesserint*, and their salaries ascertained and established; but on the address of both Houses it should be lawful to remove them. Thus were the judges withdrawn from the capricious action of the Crown, and brought under the control of Parliament. They may still be dismissed by the Crown for misconduct in office, but not otherwise, and the two Houses acting together may procure dismissal on more general grounds. The provision is substantially re-enacted in the Judicature Act, 1873, and is therefore repealed by 44 & 45 Vict. c. 59.

No pardon under the Great Seal of England is pleadable in bar of an impeachment. This provision secured the responsibility of the minister, and stayed the Crown from assuming a responsibility which it was impolitic to incur.

4. Sec. 4 does no more than confirm existing laws made for the security of religion and the freedom of the subject.

Act of State.—This term is sometimes made use of in a wider sense to describe the lawful acts of the Executive Government, that is

to say, of the Crown and its servants. In *Esposito* v. *Bowden*, 1857, 7 El. & Bl. 763, Willes, J., says of a declaration of war, that "as an act of State done by virtue of the prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law;" and see *Musgrove* v. *Pulido*, 1879, 5 App. Cas. 111. Where the legality of such an act is called in question in an action against a servant of the Crown by a British subject, it is not enough for the defendant to plead that it was an act of State; he must also show that it was lawful [according to the law of the country where the act complained of was committed (*Carr* v. *Fracis, Times, & Co.*, [1902] A. C. 176)], any unlawful interference with the person or property of the subject being actionable (*Fabrigas* v. *Mostyn*, 1773, Cowp. 161; 20 St. Tri. 229; *Entick* v. *Carrington*, 1765, 18 St. Tri. 1029; *Walker* v. *Baird*, [1892] App. Cas. 491). The last was an action of trespass against the commander of a ship of war for entering and taking possession of the lobster factories of the plaintiff on the coast of Newfoundland. He pleaded that he had acted under the orders of the Crown, for the purpose of enforcing a convention or *modus vivendi* with France; and that the matters set forth on which he rested his defence were acts and matters of State arising out of the political relations between Her Majesty and the French Republic, and that they involved the construction of treaties and of the said *modus vivendi* and other acts of State, and *were matters which could not be inquired into by the Court.* Lord Herschell, delivering the judgment of the Privy Council, on appeal from Newfoundland, dismissed as wholly untenable the suggestion that the defendant's proceedings could "be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State." The Privy Council would appear to have contented itself with affirming the jurisdiction of the Courts to inquire into the legality of such alleged acts of State, and to have abstained, in the way the case came before it, from deciding whether the particular justification would have been good if properly pleaded.

The immunity extended to the Irish Viceroy by the Irish Court scarcely seems to be in accordance with the principles laid down in the English cases (see *Tandy* v. *Lord Westmoreland*, 1800, 27 St. Tri. 1246; *Luby* v. *Wodehouse*, 1865, 17 Ir. Com. L. 618; *Sullivan* v. *Spencer*, 1872, 6 Ir. R. Com. L. 173, where it is laid down that, for an act done by the Lord-Lieutenant as Viceroy of this kingdom in his official capacity, no action can be maintained against him in this country, where he exercises the supreme authority vested in him by the Crown, and while he bears that authority). By 21 Geo. III. c. 70, s. 1, the Indian Courts are prohibited from exercising jurisdiction against the Governor-General of India, or the Governors of Madras, Bombay, or any member of their Councils, in respect of anything done by them in their public capacity.

The term "act of State," however, is often used in a more restricted sense to denote warlike or other acts done by the authority of the Crown, affecting the rights of aliens (*q.v.*) out of the Queen's dominions. Such acts are not cognisable by our municipal Courts; and in regard to them the plea of act of State may be rightly raised to oust the jurisdiction of the Courts. Aliens within the Queen's dominions are subjects bound by a local allegiance (*Calvin's Case*), and, as such, within the protection of our municipal law. When it has been desired to expel them,

or to extradite them, statutory authority has been taken by Alien Acts and Extradition Acts. But, as regards aliens out of the Queen's dominions, the Crown being the representative of the nation in its foreign relations ("what is done by royal authority, with regard to foreign powers, is the act of the whole nation," 1 Black, *Com.* 252), such acts cannot be questioned in our Courts, and redress must be obtained, if at all, by diplomatic means. In *Buron* v. *Denman*, 1848, 6 St. Tri. N. S. 525; 2 Ex. Rep. 167; 76 R. R. 554), it was held that the forcible seizure and liberation of slaves owned by an alien in territories out of the dominions of the Crown, by a British naval officer acting under the orders of the Crown, was an act of State for which no action would lie by the foreigner against the officer. In this case the officer pleaded that he had acted under the authority of the Crown, but it was only proved that the Crown had ratified his acts; it was, however, held that a subsequent ratification by the Crown was equivalent to a prior command (as to this, see also *The Rolla*, 1807, 6 Rob. C. 364; *The Franciska*, 1855, Spink. 113; *Feather* v. *R.*, 1865, 6 B. & S., at p. 296). It is in cases regarding the Native States of India that the doctrine as to such acts of State being beyond the jurisdiction of the Courts has been most fully illustrated (see the collection of cases in a note to *Bedreechund* v. *Elphinstone*, 1830, 2 St. Tri. N. S., at p. 449; 1 Knapp, P.C., 316; 12 E. R. 340). In *The Nabob of Arcot* v. *The East India Company*, 1793, 4 Bro. C. C. 180; 29 E. R. 841; 2 Ves. Jun. 56; 30 E. R. 521, a bill claiming an account from the East India Company (which then exercised sovereign powers by delegation from the Crown) was dismissed as involving a question of treaties and acts done by the company in their political capacity. Similarly, in *The Secretary of State in Council of India* v. *Kamachee*, 1859, 13 Moo. P. C. 22; 15 E. R. 9, the alleged seizure by the company of the private property of the late Rajah of Tanjore, on his decease without heirs, was held to be an act of State, into which municipal Courts had no jurisdiction to inquire. This doctrine of act of State does not, however, apply to British India, which is part of the dominions of the Crown, owned by the Crown in full sovereignty, the inhabitants of which are British subjects and, as such, under the protection of the law. [The case of *Secretary of State in Council of India* v. *Kamachee* was followed in *Cook* v. *Sprigg*, [1899] A. C. 572, where it was held that the grantees of concessions made by the paramount chief of Pondoland could not, after the annexation of Pondoland by the Crown, enforce against the Crown the privileges and rights conferred. In *West Rand Central Gold Mining Company* v. *R.*, [1905] 2 K. B. 391, gold was seized by officials of the South African Republic before the outbreak of hostilities with Great Britain. It was argued that, by reason of the conquest and annexation of the South African Republic by Great Britain, His Majesty was bound by an obligation to reimburse the suppliants. It was held, however, that there was no right which a municipal Court could enforce against His Majesty, and that a conquering State does not by annexation take over the financial liabilities of a conquered State incurred before the outbreak of hostilities, in the absence of an express stipulation.] In *Forester and Others* v. *The Secretary of State for India in Council*, 1872, L. R. Ind. Ap. Sup. vol. 10, a claim in respect of lands seized by the Indian Government on the death of the Begum Samroo was held to be within the jurisdiction of the Courts, on the grounds that the Begum was not a sovereign princess, but a British subject holding

lands in British India under a legal tenure. The control and authority exercised by the Government of India, as the paramount power over the Native States, is, on the above principles, outside the jurisdiction of our municipal Courts. These powers are sometimes so large as to raise the question whether the whole sovereignty has not been absorbed, and the native territory incorporated in the King's dominions, in which case there would be no longer room for acts of State in the restricted sense. (See Tupper, *Our Indian Protectorate;* Warner, *The Protected Princes of India; Rul. Cas.* i. 821.) See also PRIVILEGE.

Actio personalis moritur cum persona.—A personal action dies with the person. At the present day, however, it is by no means true that a personal action always dies with the person. In the older English law the maxim was of general application; it extended both to actions based upon an obligation, and to all actions based on tort (*per* Bowen, L.J., *Phillips* v. *Homfray*, 1883, 24 Ch. D. 439; *Finlay* v. *Chirney*, 1888, 20 Q. B. D. 494).

In modern times, however, the scope of the principle expressed in the maxim has been limited to actions of tort, and has not been applied to such personal actions as are founded upon any obligation, contract, debt, covenant, or any other duty to be performed (1 Wms. Saun. 240, s. 6). If a contract, however, is personal to the testator or intestate, no liability attaches to the personal representatives, unless a breach was incurred in the lifetime of the deceased (Williams, *Executors*, 10th ed., 1349; *Hyde* v. *Dean of Windsor*, Cro. (1) 552; *Siboni* v. *Kirkman*, 1836, 1 Mee. & W. 418). The rule was at one time extended to actions of debt, which did not lie against the personal representatives on simple contract, except for rent (*Norwood* v. *Read*, Pl. Com. 180; Williams on *Executors*, 10th ed., 1346), unless the undertaking to pay originated with the representative (*Riddell* v. *Sutton*, 1828, 5 Bing. 200; 30 R. R. 569); the technical reason for this being that before the abolition of wager of law, an executor or administrator, where charged for the debt of the testator or intestate, was not admitted to wage his law, thus being deprived of a legal defence which the deceased himself might have made use of (*Pinchon's Case*, 1612, 9 Co. Rep. 86; *Barry* v. *Robinson*, 1805, 1 Bos. & P. N. R. 293), but as this reason did not apply to an action of assumpsit (see ASSUMPSIT) on the case, such an action for the payment of a debt might always have been brought against the representative. Wager of law was abolished in 1833, by 3 & 4 Will. IV. c. 42, s. 13; sec. 14 of this statute enacted that an action of debt on simple contract should be maintainable in any Court of common law against an executor or administrator.

Although an action for a mere tort, such as assault or slander, dies with the wrongdoer, where, besides commission of the wrong, property is acquired which benefits the deceased, an action for the value of the property survives against the representative (*Hambly* v. *Trott*, 1776, Cowp. 371, Lord Mansfield, C.J.). Bowen, L.J., sums up the law on the subject as follows:—

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person, who has done the act, are those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person, and added to his own estate

or moneys. In such cases the action, though arising out of a wrongful act, is in substance brought to recover property or its proceeds or value, and does not die with the person. It is not every wrongful act, by which a wrongdoer indirectly benefits, that falls under this head, if the benefit does not consist in the acquisition of property or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued, merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby" (*Phillips* v. *Homfray*, *supra*). [So where, through the misrepresentations of a testator, a plaintiff had acquired certain worthless shares, he could not recover in an action for unliquidated damages against the estate though he could prove the measure of his damages (*Terry* v. *Sweeting*, [1899] 1 Ch. 387).]

Actions for breach of promise of marriage may be maintained by the representatives of the injured party, or against the representatives of the wrongdoer, only if special damage is alleged and proved. In *Chamberlain* v. *Williamson*, 1814, 2 M. & S. 408; 15 R. R. 295, an action was brought by the representative of a deceased, against a living, person for breach of promise. It was held that an action of the sort, in which no special damage was alleged, would not lie, on the ground that, except when such special damage had been occasioned, the action was in reality an action arising out of a personal injury. "Executors and administrators are the representatives of the temporal property, that is the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate." (Lord Ellenborough, S. C.) The converse case arose in *Finlay* v. *Chirney*, 1888, 20 Q. B. D. 494, where an action for breach of promise of marriage was brought against the personal representatives of the promiser. It was held that without proof of special damage, the action did not survive; and that the special damage which would cause the right of action to survive must be damage to the property, and not to the person of the promisee, and must be within the contemplation of both parties at the date of the promise, and that the action can be brought against the executors for such special damage only, and not for general damages. Actions of this kind, although in form and substance contractual, differ from other forms of actions *ex contractu*, in permitting damages to be given as for a wrong. The Courts will even, although an action for breach of promise be an action arising out of contract, apply the general principles of the maxim *actio personalis* to so much of the damages as are a remedy for mere personal wrong, and will allow so much of the remedy to survive as seems to belong to the ordinary category of an action *ex contractu* (*per* Bowen, L.J., *Finlay* v. *Chirney*, *ubi supra*).

The rule under consideration was first altered in 1330 by the Statute 4 Edw. III. c. 7, which recites that, whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the said testators carried away in their life, and enacts that the executors in such cases shall have an action against the trespassers, and recover their damages in like manner, as they, whose executors they be, should have had, if they were in life. This enactment was construed to extend to administrators (*Smith* v. *Colgay*, 1595, Cro. (1) 384), and

the right was extended to executors of executors by 25 Edw. III. stat. 5, c. 5.

This statute, being remedial in its nature, and also those amending it, have been construed very liberally; they have been held to extend to all torts except those relating to the testator's freehold, and those where the injury done is of a personal nature (*per* Bramwell, L.J., *Twycross* v. *Grant*, 1878, 4 C. P. D. 40).

Wherever a breach of contract or a tort has been committed in the lifetime of a testator, his executor is entitled to maintain an action, if it is shown upon the face of the proceedings that an injury has accrued to the personal estate (Brett, L.J., S. C.).

An action for defamation, either private character or of a person in relation to his trade, comes to an end on the death of the plaintiff; but an action for the publication of a false and malicious statement, causing damage to the plaintiff's personal estate, survives. So, in *Hatchard* v. *Mège*, 1887, 18 Q. B. D. 771, it was held that a claim for falsely and maliciously publishing a statement calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action, only so far as it was a claim for libel, but that, in so far as the claim was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover on proof of special damage.

[Where in an action of libel money had been paid into Court by the defendant without denial of liability, and had not been taken out by plaintiff on death of defendant, *pendente lite*, the Court refused payment out to the executors of the defendant, but ordered the money to be paid out to the plaintiff under Order 12, rr. 1, 5 (*Brown* v. *Feeney*, [1906] 1 K. B. 563).] An action to restrain the infringement of a registered trade mark does not fall within the rule, but where brought in respect of injury to the property of the owner of the mark can be continued by his executors (*Oakey* v. *Dalton*, 1887, 35 Ch. D., at p. 702). See *Kirk* v. *Todd*, 1882, 21 Ch. D. 484.

Where the cause of action is in substance an injury to the person, the personal representatives cannot maintain an action, merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury (*Pulling* v. *The Great Eastern Rwy. Co.*, 1882, 9 Q. B. D. 110).

A further alteration of the law was made in 1833, by Statute 3 & 4 Will. IV. c. 42, which provided a remedy for injuries to the real estate of a deceased person, and for injury by a deceased person to another in respect of his property.

Sec. 2 enacts that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong

committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person.

Before this Act, an action founded in tort, and in form *ex delicto*, could not be maintained against the personal representatives of the wrongdoer, in respect of a tort to the property of another, such as trespass, trover, waste, diverting a water-course, or obstructing lights (1 Wms. Saund. 214, 2 (1)). Apart from this statute, where chattels, wrongfully in the possession of the testator, continued *in specie* in the hands of his representative, detinue would have been maintainable to recover the specific goods (*Le Mason* v. *Dickson*, 1627, Jones, W. 173, 174).

In an action in respect of permissive waste, by non-repair of premises, brought by remainder-man in fee against executor of tenant for life, it was held that the executor was liable under the above statute (see *Jones* v. *Simes*, 1890, 43 Ch. D. 607). [As also for obstructing ancient lights (*Jenks* v. *Clifden*, [1897] 1 Ch. 694).]

An action for waste is not a claim simply depending on tort; it depends on implied contract or obligation (*Batthyany* v. *Walford*, 1887, 36 Ch. D. 269).

The representatives of a trustee or of a person occupying a fiduciary position, will be liable for wrongful acts, in respect of which an action would have been maintainable against the testator or intestate (*Concha* v. *Murietta*, 1889, 40 Ch. D., at p. 553; *New Sombrero Phosphate Co.* v. *Erlanger*, 1876, 5 Ch. D. 73; *Ramskill* v. *Edwards*, 1885, 31 Ch. D. 100; *Batthyany* v. *Walford*, *supra*; *Smith* v. *Blyth*, [1891] 1 Ch., at p. 366). [See also *Peebles* v. *Oswaldtwistle U. D. C.*, [1896] 2 Q. B. 159, where it was held that as the alleged cause of action arose out of a statutory duty to the deceased, it survived to his executors.]

At common law an executor or administrator cannot maintain an action for the loss of the life of the testator or intestate (*Higgins* v. *Butcher*, 1606, Yelv. 89; *Baker* v. *Bolton*, 1808, 1 Camp. N. P. 493; 10 R. R. 734). "In a civil Court, the death of a human being cannot be complained of as an injury" (*per* Lord Ellenborough).

In *Osborn* v. *Gillett*, 1873, L. R. 8 Ex. 88, it was held (Baron Bramwell *diss.*) that a master cannot maintain an action for injuries which cause the death of his servant. Baron Bramwell maintained that the maxim *actio personalis* clearly meant that the right of action died with the person who was to be party to the action as plaintiff or defendant, and did not apply to the entirely different cause of action possessed by the master. This view is strongly supported by Sir F. Pollock, *Law of Torts*, 7th ed., p. 62.

An important qualification of the common-law rule in this respect was effected by the measure known as Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93, amended by the Act 1864, 27 & 28 Vict. c. 95.

It confers a right of action on the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default, such that, if death had not ensued, that person might have maintained an action; but the right conferred is not for the benefit of the personal estate but "for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused."

Lord Campbell's Act does not confer on the personal representatives the right of action which the deceased would have had if he had survived, but gives to them a totally new right of action beyond it, and based on a different principle. In such an action, no compensation can be given by way of *solatium* for grief or loss of the society of the deceased [nor for the pain and suffering caused to others by the accident (*Clark* v. *London General Omnibus Co.*, 1905, 21 T. L. R. 505; 92 L. T. 691). In *Dalton* v. *S. E. Ry.*, 1858, 4 C. B. N. S. 296, it was held that the plaintiff in an action under this Act could not recover general expenses. In *Bedwell* v. *Golding*, 1902, 18 T. L. R. 436, Phillimore, J., and in *Clark* v. *London General Omnibus Co.*, *supra*, Darling, J., held that he could. In *Harris* v. *Parnall*, *Times* newspaper, July 15, 1905, Wills, J., expressed his disapproval of these two latter cases]. There must be a reasonable expectation of pecuniary benefit, as of right or otherwise, had the deceased remained alive. The security given by the statute is to individuals and not to a class (*Blake* v. *Midland Railway Co.*, 1852, 18 Q. B. 93; *Franklin* v. *South Eastern Railway Co.*, 1858, 3 H. & N. 211; *Pym* v. *Great Northern Railway Co.*, 1863, 4 B. & S. 406). [Representatives of an alien resident abroad, whose death has been caused by a British subject on the high seas, can recover (*Davidsson* v. *Hill*, [1901] 2 K. B. 606).] See CAMPBELL'S (LORD) ACT, 1846.

Practice.—Where the cause of action survives, a cause or matter does not now become abated by reason of the marriage, death, or bankruptcy of any of the parties, and does not become defective by the assignment, creation, or devolution of any estate or title *pendente lite;* and whether the cause of action survives or not, there is no abatement by reason of the death of either party between the verdict or findings of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death (R. S. C., Order 17, r. 1). See ABATEMENT.

However, a suit for divorce is at an end by the death of one of the parties, after a decree *nisi* for dissolution of the marriage has been pronounced (*Stanhope* v. *Stanhope*, 1886, 11 P. D. 103), where it was held that the legal personal representatives of the husband could not revive the suit for the purpose of applying to make the decree absolute.

In *Bowker* v. *Evans*, 1885, 15 Q. B. D. 565, it was held that, where an action for a pure tort has been referred to arbitration, it is at an end by the death of one of the parties, after the hearing and before award, although the order of reference contained a clause that the arbitrator should publish his award, ready to be delivered to the parties or their respective personal representatives, if either should die before the making of the award, on the ground that the agreement for reference affected merely the mode of trial, and did not avail to alter the rights of the parties. See generally text-books on *Negligence*, and Williams on *Executors*, 10th ed., 1905.

Action on the Case.—Case, or action on the case, was the name formerly given to an important class of actions for which there was no established form or writ (see ACTIONS); and although special forms of actions have been abolished by the Judicature Acts, the above term is frequently used to designate actions which would have fallen within the class of actions previously described by that name. The writ in an action on the case was first introduced by the repealed Statute of

Westminster the Second (13 Edw. I. c. 24), which provided that whensoever a writ should be found in Chancery, and in a like case falling under the same right, and requiring a like remedy, no precedent of a writ could be produced, the clerks in Chancery should agree in forming a new one, and if they could not so agree, it should be adjourned to the next Parliament, where a writ should be framed by consent of the learned in the law.

An action on the case was, strictly speaking, an action for the recovery of damages for an injury (by nonfeasance, misfeasance, or malfeasance (see NEGLIGENCE)), not committed with force, or to a thing not tangible, or happening consequentially, or to an interest in reversion; but it has been more generally described as an action brought to recover damages for a loss or injury arising indirectly, or consequentially, from the act complained of (see *The Common Law Commissioner's First Report*, 1851, p. 31). Thus, various causes of action, in respect of injuries resulting indirectly from a trespass, were known by the name of trespass on the case, by reason of their analogy to the old action of trespass, the distinction between the action of trespass and that of trespass on the case being, that in order to support an action of trespass the injury must have been shown to have been effected by the immediate act complained of, whereas, if the injury was merely consequential upon the act, the proper remedy was by action on the case (*Day* v. *Edwards*, 1794, 5 T. R. 648). As an illustration of this, it was said that if a man threw a log into a highway and it hit a person there, such person might maintain an action of trespass against him because of the immediate wrong; but if, while the log was lying in the highway, a person tumbled over it and was thereby injured, such person could only bring an action upon the case, because the injury was not immediately consequent on the throwing of the log (*Reynolds* v. *Clarke*, 1722, 1 Stra. 634). So, where an injury has resulted to a person from a breach of duty on the part of another, as, for instance, by the proprietor of a house allowing rain-water to be discharged from the eaves of his house on to his neighbour's land, and thereby causing an injury to the land, the remedy was by an action on the case. Slander, whereby a person's character was injured, gave a right of action on the case; and trover, which lay for the wrongful conversion of goods, and *assumpsit*, which was an action for damages for breach of a contract made otherwise than by deed, were both species of actions on the case (Stephens, *Pleading*, 7th ed., p. 13).

By the Statute of Limitations, actions upon the case (not for slander) must be commenced within six years next after the cause of such actions, and not after (21 Jac. I. c. 16, s. 3).

Actions.—At an early stage of the history of the law of England —as also of the law of Rome, France, and other continental nations— an attempt was made to group all legal proceedings under certain defined heads. And in each case the classification was unfortunately based, not so much on the right which the plaintiff desired to assert or enforce, as on the nature of the wrong done by the defendant, or the remedy which it was sought to apply to the case. It was, in short, a classification of the usual subjects of litigation; and to each class was allotted its appropriate *formula* of complaint or claim. In England such a *formula* was an essential part of the "original writ" (*breve originale*), with which the litigation commenced. The plaintiff's rights were regarded as synony-

mous, or as co-extensive, with his cause of action; and even his cause of action was limited to cases in which an appropriate *formula* was known to the officers of the Court. Writs had been provided—when or by whom we know not—for the most obvious kinds of wrong; but when, in the progress of society, novel causes of complaint arose, it was found that they were not covered by any of the writs in vogue. And the clerks of the Chancery (whose duty it was to prepare the original writ for the suitor) had apparently no power to devise a new *formula* to meet the case. They had before them an authoritative list of all the recognised forms of action; and this they regarded as an exhaustive catalogue of the injuries for which the law of England provided redress. If there was no *formula* to fit the case, the person injured had no remedy.

To meet this difficulty, the Statute of Westminster the Second (13 Edw. I. c. 24) was passed, which provided, "That as often as it shall happen in the Chancery, that in one case a writ is found, and in a like case (*in consimili casu*) falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the Chancery shall agree in making a writ, or adjourn the complaint to the next Parliament." The clerks of the Chancery made liberal use of the power thus conferred on them. But it will be observed that they still had no power to deal with cases entirely unprecedented; they could only frame new writs analogous to those previously existing (compare the Roman *actio utilis* [see Sohm's *Inst. Rom. Law*, 2nd ed., p. 273; Hunter's *Roman Law*, 3rd ed., p. 724]). Parliament, indeed, from time to time added new writs; but it still remained the law of England, down to 1875, that a plaintiff could only sue in one or other certain defined and recognised forms of action; his writ must either be according to one of the ancient original forms, or *in consimili casu* therewith, or justified by some statute. If the plaintiff selected the wrong form of action, judgment went against him, and he had to pay the defendant's costs, although he was clearly entitled to recover on a different writ (see *White* v. *Great Western Ry. Co.*, 1857, 2 C. B. N. S. 7). There were three different classes of actions —real, personal, and mixed. There were three real actions (dower, writ of right of dower, and *quare impedit*), and prior to 3 & 4 Will. IV. c. 27, there were many more. There was one mixed action, ejectment (see RECOVERY OF LAND). There were seven principal forms of personal actions: debt, covenant, assumpsit, detinue, trespass, trespass on the case, and replevin, each of which is dealt with hereafter under a separate heading. And in some cases it was only by a costly process of elimination that a plaintiff could ascertain which was his proper remedy; for the Court never decided that no action lay on the facts stated to it, but only that no action lay in the particular form which the plaintiff had been advised to select.

But all difficulty of this kind was removed by the Judicature Act, 1875. Forms of action are now in fact abolished. The plaintiff states the material facts upon which he relies, and claims the relief which he desires; there is no longer any necessity for him to specify the form of action in which he would formerly have had to seek that relief; for that is a conclusion of law, and he may safely leave the Court to draw the proper inference from the facts which he proves at the trial (*Hanmer* v. *Flight*, 1876, 24 W. R. 346; 35 L. T. 127).

Actions and Matters in the High Court.—The

Rules under the Judicature Acts adopted the common-law method of instituting an action and applied it to suits in Chancery, causes in Admiralty, and citations in Probate. Order 1, r. 1, of the Rules of the Supreme Court, 1875, provided that all such actions, suits, causes, and citations should in future be called "Actions;" and Order 2, r. 1, of those rules provided that every action should be commenced by a writ of summons indorsed with a statement of the nature of the claim, or relief or remedy sought, and should specify the Division of the Court to which it was intended that the action should be assigned.

The terms "cause," "suit," and "action" were, however, still retained for convenience in the Judicature Acts, and are each the subject of an interpretation clause in sec. 100 of the Judicature Act, 1873. As they are frequently treated as synonymous in ordinary parlance, it may be well to repeat these definitions. "Cause" includes any action, suit, or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown. "Suit" includes an action. "Action" means a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court; and does not include a criminal proceeding by the Crown. To these may here be conveniently added the following: "Matter" shall include every proceeding in the Court not in a cause.

The existing methods for commencing an action or matter in the High Court are the following, full particulars of which are given under their separate titles: (1) Writ of Summons; (2) Originating Summons; (3) Originating Notice of Motion: see MOTION; (4) Petition, Originating; (5) Petition of Right; (6) Scheme of Arrangement, Railway Companies Act, 1867: see RAILWAY; (7) Special Case, Originating. (See also BANKRUPTCY.)

Although it has been held that, for the purposes of appeal, an originating summons under Order 55, r. 3, is an action within the definition given above (*In re Fawsitt*, 1885, 30 Ch. D. 231; and see APPEALS; ORIGINATING SUMMONS), the term "action" is primarily applicable to proceedings commenced by writ of summons, and will be so used in the following remarks.

The writ of summons for commencement of an action in any Division of the Court is issued at the Central Office, Royal Courts of Justice, or at a District Registry (*q.v.*) of the High Court. It remains in force, before service, for twelve months from the date (day of issue) thereof, *including the day of such date*. The words italicised take the duration of a writ out of the general rule for computation of time (see TIME, COMPUTATION), and in view of the Statutes of Limitations (*q.v.*) this exception to the general rule is important, for, in a case to which the statute might apply, the renewal of the writ must, in order to prevent the statute from intervening, be completed not later than the *day before* the date in the following year corresponding to that which the writ bears (see RENEWAL OF WRIT).

Service of the writ must be personal unless substituted service be ordered (see SERVICE AND DELIVERY). In actions where the Courts have jurisdiction over the subject-matter of the action, but the defendant is out of the territorial jurisdiction, the writ is issued by leave only, which includes leave to effect service of the writ, or notice of the writ, out of the jurisdiction, and fixes the time for appearance (see SERVICE OUT OF THE JURISDICTION).

From 1875, when the rules under the Judicature Acts came into operation, until 1897, when Order 30 was amended by making the issue of a summons for directions compulsory (see DIRECTIONS, SUMMONS FOR), the conduct of an action from the entry of appearance (*q.v.*) by the defendant, to the trial, was left largely to the parties. The Court had not been invested with any initiative in controlling and directing the course of the action, or place or mode of trial. The rules contained certain directions as to pleadings, discovery, joinder of parties, claims for contribution or indemnity against third parties, and other interlocutory proceedings (which are dealt with under their respective titles), but the parties were left to carry out those rules, or on their own initiation to apply to the Court for such orders as might be required to give effect to them. Now, however, the judge or master in chambers is invested with power over all such matters, for in all actions to which Order 30 applies no step after appearance can be taken in the action until a summons for directions has been issued; and on the hearing of such summons, the judge or master has power to exercise the fullest discretion over all interlocutory proceedings down to and including the place and mode of trial, subject only to the rights of the parties in certain cases to trial by jury. But no directions can be given under Order 30, affecting in any way a defendant who has not appeared to the writ.

Apart from the duty of administering justice in civil actions involving real disputes on questions of law and fact, one important function of the High Court has always been the provision of machinery for the speedy recovery of just debts, and of property withheld from its proper owner, in cases where no substantial defence could be raised. Prior to the Judicature Acts actions of this nature were confined to the common law Courts, and one of the changes introduced in 1875 was the application to the Chancery Division, as well as the Queen's Bench Division, of the common law procedure for judgment in default of appearance and defence (see DEFAULT IN PROCEEDINGS IN THE HIGH COURT), and for summary judgment in cases where an action for debt or recovery of land is defended, but no substantial ground of defence exists (see SUMMARY JUDGMENT UNDER ORDER 14).

From early times actions of this kind far exceeded in number those of a more substantial nature, and the necessity was imposed upon the Court for devising some "combing out" process by which the judges could be relieved from the trivial duty of dealing with actions and disputes of an unsubstantial nature. This necessity is even greater now than it was in former times, as may be judged from the following figures.

Such actions are still almost entirely confined to the King's Bench Division, and according to the Civil Judicial Statistics published in 1905 the present average number of actions commenced in that Division is 70,238 *per annum*, while the average number disposed of by all the judges and official referees by trial in Court is 2672 *per annum*, or rather less than 4 per cent.

Of the several methods provided by Rules of Court for relieving the judges of the disposal of actions to which there is no real defence, the most important is that under which actions are summarily disposed of by the masters under Order 14 (see SUMMARY JUDGMENT), the average number of which is 7014 *per annum*. But though this is the most important, by reason of the fact that it involves summary trial of the

rights of the parties so far as to determine whether or not a substantial defence can be shown, it is the process of judgment in default of appearance or defence (see DEFAULT IN PROCEEDINGS IN THE HIGH COURT) which clears out of the way, without intervention of judge or master, by far the greatest number of actions. The average number of such judgments is 21,036 *per annum*. Of the rest, an average of 735 *per annum* are disposed of by the masters on reference, or by order to stay and dismiss, and the residue of 38,781 *per annum* are not disposed of at all. As regards these last, it can only be surmised that the mere issue of the writ secures payment of the claim, or compromise out of Court.

Regarding an action in the King's Bench Division, for the moment, in the mere light of a proceeding for the enforcement of pecuniary debts or recovery of damages, it is this automatic and summary procedure which performs nine-tenths of the work. The average amount recovered by judgment in default is £3,680,000 *per annum;* by judgment under Order 14, £2,170,000 *per annum;* while the average amount recovered on trial in Court is £600,000 *per annum*. This clearly indicates that in the main the actions tried by the judges in Court are confined to such as involve substantial questions of law or fact, and that the machinery provided for sifting them out from the general mass has proved effective.

Actions and matters in the Chancery Division are of a more important nature, and entirely different from those to which we have referred, but there also the Courts are relieved of a considerable proportion of the work of the Division by delegation to the masters in chambers (see CHAMBERS, CHANCERY DIVISION; ORIGINATING SUMMONS).

As above stated, the duty of directing the course of an action and, according to its nature, shaping it for trial, and fixing the place and mode of trial, has now been imposed upon the Court, acting through the masters in chambers.

If the action is for slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise to marry, either party may demand a jury. Subject to this, the mode of trial is fixed by the order for directions.

Witnesses are summoned to attend at the trial by writs of subpœna *ad testificandum* and *duces tecum* (see SUBPŒNAS), the latter when they are required to produce documents in their possession or power.

As to the mode of summoning juries at trials, and their qualifications; the respective functions of the judge and jury; challenges of jurymen; withdrawal of a juryman by consent; discharge of jury without agreement on a verdict, see JURY. As to witnesses; evidence; examination in chief; cross-examination; right of reply; amendment of pleadings; and other like matters relating to the trial, see WITNESS; TRIAL; AMENDMENT OF PLEADINGS.

If the jury find a general verdict for the plaintiff or defendant, judgment is usually entered in accordance with it. But the jury may find specific facts, and then the judge directs judgment according to the legal effect of the findings; and in neither case is a motion for judgment necessary. Frequently, in the case of specific findings by the jury, the judge defers his judgment, and directs the matter to be argued on further consideration (*q.v.*). As to entry of judgment, etc., see JUDGMENT.

As to appeal from judgment at the trial, and motion for new trial or

to set aside the verdict of the jury, see APPEALS; NEW TRIAL. As to reference of an action at the trial to an official or special referee, see REFERENCE OF ACTION BY ORDER. As to enforcing a judgment, see EXECUTION. As to remission of an action to a County Court, see COUNTY COURTS.

Actions, Popular.—See PENAL ACTIONS.

Acton Burnel (Statute of), intituled in the statutes of the realm, *Statutum de Mercatoribus*, was ordained by the king and his council at Acton Burnel in 4 Edw. I. It was intended to give merchants a speedy remedy for the recovery of their debts. Owing to the misinterpretation put upon it by the sheriffs, it failed in its object, until its operation was enlarged by the *Statutum Mercatorum* of 13 Edw. I. Though it established the Statute Merchant (*q.v.*), it should be noticed that the Statute of Acton Burnel did not enable a creditor to sell any lands of his debtor, except devisable burgages.

Acts of Union; Uniformity.—See UNION; UNIFORMITY.

Actual Annual Income.—See Stroud, *Jud. Dict. in loc.*

Actual Bodily Harm.—Sec. 47 of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, punishes everyone who is convicted of "an assault occasioning actual bodily harm to any person." The expression may be compared with that of "grievous bodily harm," used in sec. 18 of the same statute, which is used in collocation with the words "maim," "disfigure," and "disable." Bodily harm may be grievous without being permanent or dangerous (*R.* v. *Ashman*, 1858, 1 F. & F. 88); and to prove actual bodily harm it is submitted that it is only necessary to show some harm which is not a merely technical injury. In *R.* v. *Clarence*, 1888, 22 Q. B. D. 23, the facts were that a husband, who, to his knowledge, was suffering from venereal disease, had marital intercourse with his wife without informing her of the fact. As she suffered grievous bodily harm from the infection thereby communicated to her, the question arose whether the husband had been rightly convicted upon an indictment charging him with "unlawfully and maliciously inflicting grievous bodily harm," under sec. 20 of the above Act, and with "an assault upon her," occasioning actual "bodily harm," under sec. 47. It was held by a majority of the judges in the Court for Crown Cases Reserved, that the conduct of the prisoner did not constitute an offence under either section of the statute, and that the conviction must be quashed.

On an indictment for an assault occasioning actual bodily harm, the defendant may be convicted of a common assault (*R.* v. *Yeadon*, 1861, L. & C. 81). See Stroud, *Jud. Dict.*, 2nd ed. ("Inflict"); Arch. Cr. Pl., 833.

Actual Capture.—In the law of prize (*q.v.*), the presumption is always in favour of actual capture as against those who claim to be joint captors. Under certain circumstances, claims of joint capture are admitted, but the Prize Court has again and again declared its resolution not to extend the operation of that doctrine. Actual capture may

therefore be taken to be the rule which will always be enforced in the adjudication of naval prize, except in cases in which the application of constructive capture is well recognised and established (*per* Dr. Lushington, *Banda and Kirwee Booty*, 1866, 35 L. J. Adm. 17).

Actual Enjoyment.—See PRESCRIPTION.

Actual Entry.—An actual entry upon land is made so soon as the person desiring to make an entry has any part of his body upon the land, and such entry is complete and effectual even though he should immediately afterwards be dragged off by force. If the person entitled be hindered from making an actual entry by fear of violence, he may make an *entry in law* by approaching as near as he safely may, and there making his claim, which, under such circumstances, will take effect as an actual entry. Proof must be given that an entry in deed could not safely be made. An actual entry upon the lands converts a seisin in law into a seisin in deed, such entry being intended to be made with that purpose and in that behalf (Challis, *Law of Real Property*, 2nd ed., 1892, p. 208). See SEISIN.

Actual Military Service.—The privilege of making a nuncupative will given to "any soldier being in actual military service" (Statute of Frauds, s. 22, and Wills Act, 1 Vict. c. 26, s. 11), is confined to those who are on an expedition, and does not extend to soldiers quartered in barracks at home or in the colonies; but going into barracks under orders for foreign service with a view to being drafted to the seat of war is "actual military service" (*In the Goods of Hiscock*, [1901] P. 78), and the will is good even though the testator was a minor at the time it was made (*ibid.*). An order for mobilisation, with a view to proceeding to the seat of war, so alters a man's position as to place him *in expeditione*, and though still in barracks he becomes, from the date the order is received, on "actual military service" (*Galtward* v. *Knee*, [1902] P. 99), but a "mere warning" for active service is not sufficient (*ibid.*). See also *In the Goods of Gordon*, 1905, 21 Times L. R. 653, where a sergeant at Woolwich, ordered to proceed to Fermoy to join the Munster Fusiliers, and to proceed with the regiment to South Africa, was held to be on "actual military service" from the time he received orders at Woolwich, and a soldier's will made there was admitted to probate; Stroud, *in loc.;* and NUNCUPATIVE WILL.

Actual Possession.—As soon as a person is entitled to possession, and enters in the assertion of that possession, or any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the rights of possession, and if the question is which of the two is in *actual possession*, the person who has the title is in actual possession, and the other person is a trespasser; . . . the question which of the two really is in possession is determined by the fact of the possession following the title, that is, by the law which makes it follow the title (*per* Maule, J., in *Jones* v. *Chapman*, 1847, 2 Ex. Rep. 821; 76 R. R. 799; and see *Butcher* v. *Butcher*, 1827, 7 Barn. & Cress. 402; 31 R. R. 237; *Hey* v. *Moorhouse*, 1839, 6 Bing.

N. C. 52; *Lows* v. *Telford*, 1876, 1 App. Cas. 414; *Bristowe* v. *Cormican*, 1878, 3 App. Cas. 661; and Lightwood, *Possession of Land*). What amounts to "actual possession" for the purpose of a voting qualification was considered in the following cases: *Murray* v. *Thorniley*, 1846, 2 C. B. 217; 69 R. R. 477; *Webster* v. *Overseers of Ashton-under-Lyne* (*Orme's Case*), 1872, L. R. 8 C. P. 281; *Webster* v. *Overseers of Ashton-under-Lyne* (*Hadfield's Case*), 1873, L. R. 8 C. P. 306; *Lowcock* v. *Overseers of Broughton*, 1883, 12 Q. B. D. 369.

As to chattels bequeathed as heirlooms on trust to go along with, and be enjoyed by the person for the time being entitled to the actual possession of, real estate, see *In re Angerstein*, [1895] 2 Ch. 883.

Actual Seisin.—See SEISIN.

Actual Seizure.—The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, provides that no writ of *fi. fa.* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the *actual seizure* or attachment thereof by virtue of such writ; provided that such person had not, at the time when he acquired such title, notice that such writ or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the Sheriff, Under-Sheriff, or Coroner.

In this section "actual seizure" means no more than "seizure," inasmuch as no such fiction as constructive seizure was resorted to before the Act (*per* Bramwell, B., *Gladstone* v. *Padwick*, 1871, L. R. 6 Ex. 203).

Actual Total Loss.—See MARINE INSURANCE.

Actuary.—A person skilled in calculating the value of life interests, annuities and insurances, or an officer appointed to keep savings bank accounts, or the manager of an insurance company.

In English law the first mention of the word occurs in the Friendly Societies Act, 1819 (*vide* 59 Geo. III. c. 128, s. 2), where we find "actuaries or persons skilled in calculating." Since the establishment in 1848 of the Institute of Actuaries (incorporated by royal charter on the 29th July 1884), the term is employed with precision to designate a person skilled in calculating the value of life interests, annuities and insurances.

The profession of actuary is one requiring a wide and varied training. Examinations have to be passed, which are conducted in writing, or partly in writing, and partly *vivâ voce*. Members of the Institute are divided into five classes, viz.: (1) Fellows; (2) Associates; (3) Students; (4) Honorary Members; and (5) Corresponding Members. But persons who were members of the collective body established in the year 1848, and exercised the calling or profession of actuary, are fellows of the Institute as a matter of course. The examination to qualify students for admission to the class of associates consists of two parts; the subjects of Part I. including arithmetic, algebra, the first three books of Euclid, elements of the theory of compound interest, including annuities and the elements of book-keeping. The subjects of Part II. are theory of compound interest, including annuities certain, the application of the

theory of probabilities to life contingencies, the theory of life contingencies, including annuities and assurances on lives or survivorship, etc. If any associate should desire to become a fellow, he has a further examination to pass, the subjects of which include the elements of the law of real and personal property, the law relating to life assurance contracts, and to joint-stock companies and friendly societies, the principles of banking and finance, including a knowledge of the constitution and operations of the Bank of England, etc., etc. The principal duties of an actuary are the making of investigations and reporting on the financial condition of companies under the various Friendly Societies Acts, 1833-1889 inclusive.

[*Vide* more particularly the Friendly Societies Act, 1875, and the Life Assurance Companies Act, 1870; and further, the Royal Charter of Incorporation Bye-Laws, and Forms of Application for Admission.]

Ad damnum.—Under the old system of pleading, the declaration—now statement of claim (*q.v.*, and see ACTIONS AND MATTERS IN THE HIGH COURT)—usually concluded "to the damage of the plaintiff of £ ," etc. In penal actions (*q.v.*) at the suit of a common informer, as the plaintiff's right to the penalty did not accrue till the bringing of the action, and he could not have sustained any damage by a previous detention of the penalty, it was not proper to conclude *ad damnum* (1 Chit. P. C. 419).

Address for Service.—See SERVICE.

Ademption is complete or partial revocation of a benefit given by will, by a subsequent event in the testator's lifetime, not being a revocation by a testamentary instrument, or in a manner authorised by the Wills Act.

1. A legacy given to a child by the will of a parent, or of a person who has undertaken the duties of a parent towards the child, may be wholly or partially adeemed by a subsequent gift to the child in the parent's lifetime. Ademption in this sense is based upon the presumption against double portions; that is to say, that the Court will not impute to a parent the intention of providing for a child twice over. For the purposes of this doctrine a legacy given to a child without explanation is to be considered as a portion (*Ex parte Pye*, 1811, 18 Ves. 141; 34 E. R. 271; 11 R. R. 173).

The doctrine does not apply to a devise of real estate (*Davys* v. *Boucher*, 1839, 3 Y. & C. Ex. 397).

The circumstances or the admissible evidence may show that a subsequent gift was not intended to be a portion, or was not intended to be in substitution for the benefit given by will, but in the absence of such circumstances or evidence the doctrine applies (*Leighton* v. *Leighton*, 1874, L. R. 18 Eq. 458; *In re Lacon; Lacon* v. *Lacon*, [1891] 2 Ch. 482).

If, therefore, a father leaves legacies to his children, and afterwards makes one of them a gift in his lifetime, the legacy is adeemed to the extent of the gift (*Pym* v. *Lockyer*, 1840, 5 My. & Cr. 29; 41 E. R. 283; 48 R. R. 219). [The presumption against double portions will not hold if the testamentary portion and the subsequent advancement are

not *ejusdem generis*, as the rule established by *Holmes* v. *Holmes*, 1783, 1 Bro. C. C. 555; 28 E. R. 1295, is still law, and the Court of Appeal in *In re Jaques, Hodgson* v. *Braisby*, [1903] 1 Ch. 267, dissented from the observations of North, J., in *In re Vickers*, 1888, 37 Ch. D. 525, 534, upon *In re Lawes*, 1881, 20 Ch. D. 81.]

Where a residue is given to children, the share of one of the children may in like manner be adeemed by a subsequent gift to the child (*Montefiore* v. *Guedalla*, 1859, 1 De G., F. & J. 93; 45 E. R. 294).

If a legacy is adeemed, the residuary legatee is necessarily benefited; but, in the case of gifts of residue, the presumption against double portions will not be applied against a child in favour of a stranger (*Meinertzagen* v. *Walters*, 1872, L. R. 7 Ch. 670, distinguishing *Montefiore* v. *Guedalla, supra*).

A variance between the provision made by the will and the gift will not prevent ademption. The question is whether both are to be considered as portions or not. Therefore a legacy given absolutely may be adeemed by a sum settled upon marriage, and conversely, a settled legacy may be adeemed by an absolute gift (*Trimmer* v. *Bayne*, 1802, 7 Ves. 508; 32 E. R. 205; 6 R. R. 173; *Lord Durham* v. *Wharton*, 1836, 3 Cl. & Fin. 146; 6 E. R. 1392; 39 R. R. 13; *Kirk* v. *Eddowes*, 1844, 3 Hare, 509; 64 R. R. 390; *Cooper* v. *Macdonald*, 1873, L. R. 16 Eq. 258; *Stevenson* v. *Masson*, 1873, L. R. 17 Eq. 78).

It will not prevent ademption that the legacy is in certain events given over. If the legacy is adeemed, the limitations over fail as well (*Twining* v. *Powell*, 1845, 2 Coll. 262; 63 E. R. 726; *Cooper* v. *Macdonald*, 1873, L. R. 16 Eq. 258).

The provision by will and the gift need not be the same in kind. For instance, a share of residue may be adeemed by the gift of a business (*In re Vickers; Vickers* v. *Vickers*, 1888, 37 Ch. D. 525), [but see the observations of the Court of Appeal on this case in *In re Jaques*, [1903] 1 Ch. 267].

A legacy once adeemed is not revived by a republication of the will by a codicil (*Powys* v. *Mansfield*, 1837, 3 My. & Cr. 376; 40 E. R. 971; 45 R. R. 277), [but such republication must not be left out of consideration (*In re Scott; Langton* v. *Scott, infra*)]. See CODICIL; WILL.

The doctrine does not apply when the persons benefited by the will and the gift are entirely different; for instance, issue of a deceased child taking under the will and the child himself taking under the gift, or a daughter and her children taking under the will, and the daughter's husband having land under the gift (*Rose* v. *Rogers*, 1870, 39 L. J. Ch. 791; *Ravenscroft* v. *Jones*, 1863, 32 Beav. 669, 4 De G., J. & S. 224; 46 E. R. 904; *Cooper* v. *Macdonald*, 1873, L. R. 16 Eq. 258).

Small occasional presents are not to be considered portions for the purposes of the rule (*Ravenscroft* v. *Jones*, 1863, *supra; Watson* v. *Watson*, 1864, 33 Beav. 574; 55 E. R. 491). [Nor is a sum advanced by a father to pay his son's debts necessarily an advance by way of portion, but may be considered as temporary assistance. In this case the Court preferred the view of Jessel, M.R., in *Taylor* v. *Taylor*, 1875, L. R. 20 Eq. 155, to that taken in *Boyd* v. *Boyd*, 1867, L. R. 4 Eq. 305, and in *In re Blockley*, 1885, 29 Ch. D. 250 (*In re Scott; Langton* v. *Scott*, [1903] 1 Ch. 1).]

Upon a question of ademption, evidence is not admissible to explain the will, but all the circumstances attending the subsequent gift may be

put in evidence, including declarations of the testator as to his intentions (*Kirk* v. *Eddowes*, 1844, 3 Hare, 509; 64 R. R. 390).

2. The doctrine of ademption also applies if a legacy to a stranger is expressed to be given from a feeling of moral obligation, and a gift is afterwards made to him from the same motive. The presumption is that the obligation was not intended to be discharged more than once (*In re Pollock*; *Pollock* v. *Worrall*, 1885, 28 Ch. D. 552); [but a legacy to a trustee for the benefit of an infant to whom the testator is not *in loco parentis* is not given for a particular purpose within (*Pankhurst* v. *Howell*, 1870, L. R. 6 Ch. 136, and *In re Pollock*, *supra*, so as to be adeemed by a subsequent gift of the same sum to the same trustee for the same purpose (*In re Smythies*; *Weyman* v. *Smythies*, [1903] 1 Ch. 259)].

3. A legacy expressed by the will to be given for a particular purpose is adeemed if the testator afterwards satisfies that purpose in his lifetime (*Debeze* v. *Mann*, 1787, 1 Cox, 346; 29 E. R. 1197; 1 R. R. 57; *Pankhurst* v. *Howell*, 1870, L. R. 6 Ch. 136).

The same result follows if, though the legacy is not stated to be given for a particular purpose, it appears by presumption of law to have been so given, as, for instance, to satisfy a debt which is afterwards paid (*In re Fletcher*; *Gillings* v. *Fletcher*, 1888, 38 Ch. D. 373).

4. The term ademption is also applied to the case of a legacy of a specific thing which no longer exists at the testator's death. The destruction of the thing destroys the legacy. See LEGACY.

For instance, destruction by the act of God (*q.v.*), a sale by the testator, or by lawful authority, or conversion into something different, will make the specific gift inoperative (*Durrant* v. *Friend*, 1852, 5 De G. & Sm. 343; 64 E. R. 1145; *Ashburner* v. *Macguire*, 1786, 2 Bro. C. C. 108; 29 E. R. 262; *Jones* v. *Green*, 1868, L. R. 5 Eq. 555; *Harrison* v. *Jackson*, 1877, 7 Ch. D. 339; *In re Lane*; *Luard* v. *Lane*, 1880, 14 Ch. D. 856; *In re Freer*; *Freer* v. *Freer*, 1882, 22 Ch. D. 622).

An unauthorised conversion will not cause ademption (*In re Larking*; *Larking* v. *Larking*, 1887, 37 Ch. D. 310). See CONVERSION.

In the same way, a gift of a debt is adeemed if paid to the testator during his life, whether the payment is voluntary or compulsory (*In re Bridle*, 1879, 4 C. P. D. 336).

A contract for sale of the thing bequeathed enforceable against the testator at his death has the same effect (*Watts* v. *Watts*, 1873, L. R. 17 Eq. 217; *Crowe* v. *Menton*, 1891, 28 L. R. Ir. 519).

But there is no ademption if the contract is afterwards rescinded, owing to a defect in the testator's title (*In re Thomas*; *Thomas* v. *Howell*, 1886, 34 Ch. D. 166).

It has even been held that an option to purchase certain property conferred by the testator after the date of his will, but not exercised till after his death, will destroy a specific gift of the property (*Weeding* v. *Weeding*, 1861, 1 John. & H. 424; see *Lawes* v. *Bennett*, 1785, 1 Cox, 167; 29 E. R. 1111; 1 R. R. 10; *Townley* v. *Bedwell*, 1808, 14 Ves. 591; 33 E. R. 648; 9 R. R. 352; *In re Isaacs*; *Isaacs* v. *Reginall*, [1894] 3 Ch. 506).

But this doctrine has been held inapplicable to a gift of specific property, subject to an option of purchase existing at the date of the will (*Drant* v. *Vause*, 1842, 1 Y. & C. C. 580; 62 E. R. 1026; *Emuss* v. *Smith*, 1848, 2 De G. & S. 722; 64 E. R. 323; *In re Pyle*; *Pyle* v. *Pyle*, [1895] 1 Ch. 724).

A change which leaves the thing substantially the same as before will not adeem the gift. The question is one of fact in each case, whether the thing remains in effect the same or not. [*In re Vickers; Vickers* v. *Mellor*, 1899, 81 L. T. 719.] For instance, conversion of shares into stock does not, but conversion of debentures into debenture stock does, make such a change as to cause ademption (*Oakes* v. *Oakes*, 1852, 9 Hare, 666; *In re Lane; Luard* v. *Lane*, 1880, 14 Ch. D. 856).

An appointment of specific securities under a power is not adeemed by a subsequent change of investment (*In re Johnstone's Settlement*, 1880, 14 Ch. D. 162; *Willett* v. *Finlay*, 1891, 29 L. R. Ir. 156, 497).

And though there is some conflict of authority, the better opinion appears to be that a devise of an estate, under a power in a settlement, is not adeemed by a subsequent sale of the estate under the powers conferred by the settlement (*Cooper* v. *Martin*, 1867, L. R. 3 Ch. 47; *In re Lowman; Devenish* v. *Pester*, [1895] 2 Ch. 348; see, however, *Gale* v. *Gale*, 1856, 21 Beav. 349; 52 E. R. 894; *Blake* v. *Blake*, 1880, 15 Ch. D. 481). [Nor is any distinction to be drawn between general and special powers (*In re Dowsett; Dowsett* v. *Meakin*, [1901] 1 Ch. 398; which case was approved in *Beddington* v. *Baumann*, [1903] A. C. 13).]

If the gift is so expressed as to show the testator's intention that the legatee is to take the benefit, whatever may be the condition or state of investment at his death of the thing given, no case of ademption will arise, and the gift will take effect if the property can be traced (*Moore* v. *Moore*, 1859, 29 Beav. 496; 54 E. R. 720; *Morgan* v. *Thomas*, 1877, 6 Ch. D. 176). [See also *Toole* v. *Hamilton*, [1901] 1 Ir. 383.]

In the case of gifts of furniture in a house, a permanent removal will, but a temporary removal will not, deprive the legatee of the right to the furniture (*Blagrove* v. *Coore*, 1859, 27 Beav. 138; 54 E. R. 53; *In re Johnston; Cockerell* v. *Earl of Essex*, 1884, 26 Ch. D. 538).

[See Williams on *Executors*, part iii. bk. iii. ch. iii.; White and Tudor, 7th ed., 1897, vol. ii. pp. 380 *et seq.*; Theobald on *Wills*, 6th ed., 1905, pp. 162 *et seq.*, 735 *et seq.*]

Adhering to the King's Enemies.—See TREASON.

Ad idem.—A phrase descriptive of an essential element in an agreement or contract; an agreement being the outcome of consenting minds having a distinct intention in common. If the parties are not *ad idem* there is no contract. See CONTRACT.

Adjacent Support.—See ADJOINING OWNERS; SUPPORT.

Adjective Law.—An expression used in jurisprudence to describe the department of law which is concerned with practice and procedure. It is contrasted with "substantive" law, the name applied to the law which the Courts are established to administer. It denotes the rules according to which the substantive law is administered, and the modes of procedure by which legal rights are enforced. Prof. Holland (*Jurisprudence*, c. xv.) says: "Adjective law, though it concerns primarily the rights and acts of private litigants, touches closely on topics, such as the organisation of Courts, and the duties of judges and sheriffs, which belong to public law." It comprises the rules for—

1. Selecting the jurisdiction which has cognisance of the matter in question.

2. Ascertaining the Court which is appropriate for the decision of the matter.

3. Setting in motion the machinery of the Court, so as to procure its decision.

4. Setting in motion the physical force by which the judgment of the Court is in the last record to be rendered effectual.

In common with private law, public and international law is divisible into substantive and adjective.

The terms "substantive" and "adjective," originally employed by Bentham (*Works*, ii. 6), have been generally adopted by English jurists, although their use was severely criticised by Austin (*Jurisprudence*, ii. 788).

Adjoining Owners.—*Lands Clauses Act*, 1845.—When lands have been acquired for the purpose of an undertaking, *e.g.* a railway, under the provisions of the Lands Clauses Act, 1845, 8 & 9 Vict. c. 18, or a special Act, "adjoining owners" are given certain rights with regard to land which is not required for the purposes of the undertaking, called "superfluous lands," a term that has received judicial interpretation in a number of cases (see particularly *Great Western Railway* v. *May*, 1874, L. R. 7 H. L. 283; *Hooper* v. *Bourne*, 1877, 3 Q. B. D. 258; *Betts* v. *Great Eastern Railway*, 1879, 49 L. J. Ex. 197; *Hobbs* v. *Midland Railway*, 1882, 20 Ch. D. 418; *Dunhill* v. *North-Eastern Railway*, [1896] 1 Ch. 121; *Macfie* v. *Callander and Oban Railway*, [1898] A. C. 270). The promoters of an undertaking are required to sell and dispose of such superfluous lands within the time prescribed by the special Act, or, if no period has been prescribed, then within ten years after the expiration of the time limited by the special Act for the completion of the works, giving, however (unless such lands are situate within a town, or are lands built upon or used for building purposes), a right of pre-emption, first, "to the person then entitled to the lands (if any) from which the same were originally severed, or if such person refuse to purchase the same, or cannot, after diligent inquiry, be found, then the like offer shall be made to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold, such persons being capable of entering into a contract for the purchase of such lands; and where more than one such person shall be entitled to such right of pre-emption, such offer shall be made to such persons in succession, one after another, in such order as the promoters of the undertaking shall think fit" (Lands Clauses Act, 1845, s. 128). The right of pre-emption thus given must be exercised, if at all, within six weeks after the offer of sale has been made to any person entitled (s. 129). Superfluous lands, not so disposed of at the expiration of the period prescribed, "thereupon vest in and become the property of the owners of the lands adjoining thereto, in proportion to the extent of their lands respectively adjoining the same" (s. 127). In the Irish case of *Miller* v. *Waterford Harbour Commissioners*, [1904] 2 Ir. R. 421, it was held that the lands vested by force of a conditional limitation and not of a forfeiture. It is to be observed that a person may not be an "adjoining owner," within sec. 127, although he may be entitled to a

right of pre-emption under sec. 128 (*Hooper* v. *Bourne, ubi supra; Hobbs* v. *Midland Railway, ubi supra*).

A company may, by its special Act, be relieved from the obligation of disposing of its superfluous lands, and in such a case the rights of adjoining owners under these sections do not arise (see *Tomlin* v. *Budd*, 1874, L. R. 18 Eq. 368).

It seems not quite clear whether sec. 127 applies where an undertaking has been abandoned (see *Astley* v. *Manchester, Sheffield, and Lincolnshire Railway*, 1858, 2 De G. & J. 453, 463; 44 E. R. 1065; and *Smith* v. *Smith*, 1868, L. R. 3 Ex. 282); but even where there has been an abandonment, the rights of an adjoining owner do not arise until the expiration of the prescribed period (*Astley* v. *Manchester, Sheffield, and Lincolnshire Railway, ubi supra*), unless, indeed, the company have sold the land as superfluous land (*Carington* v. *Wycombe Railway*, 1868, L. R. 3 Ch. 377), or by some act of theirs have shown that they are about to dispose of it as superfluous land (*Astley* v. *Manchester, Sheffield, and Lincolnshire Railway, ubi supra; London and South-Western Railway* v. *Blackmore*, 1870, 39 L. J. Ch. 713). It is to be observed, however, that by the word "dispose" the Act contemplates the transfer of the land to some other person, not the application of it by the company to a new purpose (*Astley* v. *Manchester, Sheffield, and Lincolnshire Railway, ubi supra*); see also *Dunhill* v. *North-Eastern Railway*, [1896] 1 Ch. 121, where it was decided that no right of pre-emption arose where, within the prescribed period, lands which had been acquired by one railway company were compulsorily purchased by another company for the purpose of their undertaking.

In Ireland it has been held that sec. 127 does not apply to a derelict railway (*In re Duffy's Estate*, [1897] 1 Ir. R. 307). It should be noted, however, that this decision has been doubted by the authors of the 5th edition [1905] of Cripps on *Compensation*, p. 285.

In *Hooper* v. *Bourne, ubi supra*, it was decided that where, adjoining the superfluous lands, there was a road, the soil of which was vested in the lord of the manor, but upon which certain persons were entitled to grass and herbage, the lord of the manor was the adjoining owner under sec. 127, and not the persons entitled to such grass and herbage.

Mines and minerals expressly granted to a railway company with lands which have become superfluous lands, under sec. 127 do not pass to the adjoining owner with the land (*Hooper* v. *Bourne, ubi supra*). Lessees for years may be adjoining owners under sec. 128 (*Coventry* v. *London, Brighton, and South Coast Railway*, 1867, L. R. 5 Eq. 104), where it was also decided that lands separated from the superfluous lands by a private road, of which the lessees had the exclusive right of user during their tenancies, were "immediately adjoining lands," within the same section.

A person may be an "adjoining owner," within sec. 128, although he purchased the adjoining lands from the company against which he claims a right of pre-emption; and the existence of a boundary wall on land, the joint property of such person and the company, does not prevent such person from being considered an "adjoining owner" (*London and South-Western Railway* v. *Blackmore, ubi supra*).

Where there are several adjoining properties in contact with the superfluous land, such superfluous land is to be divided among the adjoining owners in proportion to the frontage of each, meaning by

frontage what would be the length of the line of contact of each property, if such line were made straight from the point of intersection of the boundaries on one side to the point of intersection of the boundaries on the other side (*Moody* v. *Corbett*, 1866, L. R. 1 Q. B. 510, 518; but see also *Smith* v. *Smith*, *ubi supra*). As all adjoining owners have equal rights of pre-emption, if only one is plaintiff, an inquiry will be directed to ascertain whether any of the other adjoining owners are desirous of purchasing (*London and South-Western Railway* v. *Blackmore*, *ubi supra*). See more fully Cripps on *Compensation*, 5th ed. [1905].

Public Health Act, 1875.—Owners of premises "fronting, adjoining, or abutting" on streets are chargeable, under sec. 150 of the Public Health Act, 1875, with the expense of sewering, paving, etc., the streets referred to in that section. In *Lightbound* v. *Higher Bebington Local Board*, 1885, 16 Q. B. D. 577, 584, Bowen, L.J., dealt with the meaning of "adjoining." He said: "In considering whether houses adjoin, which are placed in close proximity to the part of the street which is to be paved, it is a most important fact, and in many cases a dominant fact, to see whether there is a substantial access and advantage which the houses enjoy from that portion of the street which is to be paved, and a substantial access and advantage of that kind, coupled with close proximity, may bring the case within the word 'adjoin,' though there is no actual touch."

Right to Support.— At common law, every proprietor of land is entitled to such support to the soil of his land from that of the adjoining owner as is necessary to sustain his own land in its natural unencumbered state, *i.e.* unweighted by buildings, and an action is maintainable in respect of a subsidence caused by the withdrawal of such support. (See cases collected in Smith's L. C., 11th ed., vol. i. pp. 279-283.) There is no common-law right to support for buildings, but such a right may be acquired by grant, express or implied, or by prescription (see EASEMENTS; PRESCRIPTION; SUPPORT).

Fences and Boundaries.—Where branches of a tree growing upon the land of one owner overhang that of another, the owner of the land encroached upon is entitled, without notice, if he does not trespass on the adjoining land, to cut the branches so far as they overhang, although they have done so for more than twenty years (*Lemmon* v. *Webb*, [1895] App. Cas. 1). An action will lie against a landowner who allows his trees to overhang his neighbour's land so as to cause damage to his crops (*Smith* v. *Giddy*, [1904] 2 K. B. 448).

The occupier of one tenement of land is under no duty towards the occupier of the adjoining tenement to periodically cut the thistles growing on his land so as to prevent them from seeding, and he is not liable for any damage caused by seeds blown on to the adjoining land (*Giles* v. *Walker*, 1890, 24 Q. B. D. 656). A person is not entitled to recover for injury caused to his animals through eating the branches growing on his neighbour's land, and not projecting over the same (*Ponting* v. *Noakes*, [1894] 2 Q. B. 281). But it is otherwise if the noxious trees project over the neighbour's land (*Crowhurst* v. *Amersham Burial Board*, 1878, 4 Ex. D. 5), in which case *Wilson* v. *Newbury*, 1871, L. R. 7 Q. B. 31, was explained at page 12. (For illustrations of the maxim, *Sic utere tuo ut alienum non lædas*, see NEGLIGENCE and NUISANCE.)

There is no duty at common law to fence out a neighbour's beasts,

the duty being the other way, viz., to keep one's own animals from trespassing (*Ricketts* v. *E. and W. India Docks*, 1852, 12 C. B. 160). Such a duty may, however, be imposed by statute (*ibid.* 174); or may arise by prescription (*Lawrence* v. *Jenkins*, 1873, L. R. 8 Q. B. 274).

In Viner's *Abridgment*, *s.v.* "Trespass" L. a., it is stated: "If trees grow in my hedge, hanging over another man's land, and the fruit of them falls into the other's land, I may justify my entry to gather up the fruit, if I make no longer stay there than is convenient, nor break his hedge;" and the same is laid down with regard to trees blown over by the wind (*ibid.* H. a., 2). But a previous request to deliver the property might probably be necessary (see *Anthony* v. *Haney*, 1832, 8 Bing. 186; 34 R. R. 670); and if the owner (or occupier) of the adjoining tenement refused, after request, to deliver up the property or to make any answer to the owner's demand, "a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit" (*per* Tindal, C.J., in *Anthony* v. *Haney*, *ubi supra*, at p. 193). The rule stated above with regard to the right of entry upon an adjoining tenement to retake fruit or trees which have accidentally fallen there, appears not to hold where trees have fallen through cutting (Vin. *Abr.*, "Trespass," H. a., 2; *Anthony* v. *Haney*, *ubi supra*). See TRESPASS.

Where the boundary between two adjoining tenements is marked by a hedge and ditch, the presumption is that the latter belongs to the owner of the former, but it appears doubtful whether the presumption holds where the ditch is not an artificial but a natural water-course (*Marshall* v. *Taylor*, [1895] 1 Ch. 641).

London Building Act, 1894.—The term "adjoining owner" occurs also in the London Building Act, 1894. By sec. 5, subs. 32, of that statute, an "adjoining owner" is defined as "the owner or one of the owners . . . of land, buildings, storeys, or rooms adjoining those of the building owner," and on the corresponding section (82) of the Metropolis Building Act, 1855 (which was repealed by the Act of 1894), it was decided in *Fillingham* v. *Wood*, [1891] 1 Ch. 51, that a tenant in possession of part of a house for a greater interest than as tenant from year to year, was an "adjoining owner." As to rights of adjoining owners under this Act, see secs. 87-101 and sched. 1, prel. r. 10.

As to the rights of owners of adjoining tenements divided by a party wall, see PARTY WALL.

Adjourned Sessions.—1. GENERAL OR QUARTER SESSIONS. —12 Ric. II. c. 10 enacts that the justices of the peace "shall keep their sessions in every quarter of the year at least and by three days if need be." The Commission of the Peace does not contain any direction as to particular times for holding sessions, but only a command that "at certain days and places, which you or any such two or more of you as aforesaid shall appoint for these purposes, into the premises you make inquiries and all and singular the premises hear and determine. . . ." The sessions which the justices must hold under 12 Ric. and later statutes have come to be called Quarter Sessions, whilst those other sessions which they *may* also hold under the Commission of the Peace, have came to be called General Sessions; but Quarter Sessions are, in fact,

only a species of "General" Sessions, as distinct from "Special" or Petty Sessions (see *R.* v. *Mullany*, 1833, 6 C. & P. 96). The main reason of the distinction sometimes drawn between Quarter Sessions and other "General" Sessions, lies in the terms of certain statutes allowing certain acts to be done only at Quarter Sessions; but the statutory definition of Quarter Sessions in 52 & 53 Vict. c. 63, s. 20 (11) (which applies to all Acts unless there be special indications of a contrary intention), includes the justices assembled in General *or* Quarter Sessions.

The times for holding County Quarter Sessions are fixed by 11 Geo. IV. and 1 Will. IV. c. 70, s. 35, subject to the power given by 57 Vict. c. 6, to vary the dates so as not to clash with Assizes. Prior to the latter Act it was usual, but not in law necessary, to adjourn Quarter Sessions if they came on simultaneously with Assizes, so that criminal trials should not be proceeding in both Courts at the same time (*Anon.*, 1841, 9 C. & P. 790). The times for holding Borough Quarter Sessions are fixed by 45 & 46 Vict. c. 50, s. 165.

When the business of Quarter or General Sessions is not completed in one day, the Court may, by adjournment, continue the sessions *de die in diem*, or adjourn to a later day and another place, provided that the session so adjourned does not overlap the next "Quarter" Sessions (*Lingfield* v. *Battle*, 1702, 2 Salk. 636), and it is now the established practice to hold additional sessions in the intervals between the regular Quarter Sessions by adjournment of the sessions for one quarter to a date or dates prior to those fixed for the sessions of the next quarter. This practice in no way prevents the justices from also holding original "General" Sessions independent of the Quarter Sessions, original or adjourned. In the County of London, under 51 & 52 Vict. c. 41, s. 42, special provision is made for holding separate and simultaneous Courts of Quarter Sessions, and giving every Court of General Sessions for the county all the jurisdiction of a Court of Quarter Sessions.

Adjournments of General or Quarter Sessions for a county, riding, division, or liberty, to be valid, must be made by, or in the presence of, two or more justices (*R.* v. *Middlesex JJ.*, 1834, 5 B. & Ad. 1113; 39 R. R. 736). In Borough Quarter Sessions the adjournment is made by the recorder or his deputy, or, in their absence, by the mayor (45 & 46 Vict. c. 50, s. 167, subs. 1).

For some purposes a general adjournment seems unnecessary, *e.g.* where the Court has agreed to state a case it has been held that this implied such adjournment as would be necessary to complete and state the case.

The power of adjournment, subject to the limitation already stated is inherent in the Court, and may be exercised for any reason which to the justices seems sufficient in the interests of justice or convenience whether it be press of business, the expediency of taking cases from different parts of the county at different times or places, or the existence of an equal division of opinion among the justices present—the chairman having no casting vote (*R.* v. *Fladbury*, 1841, 10 A. & E. 706).

The business which may be taken at adjourned sessions is not in practice limited to that which was before the Court at its original sitting. There would seem to be power to summons, under 1 & 2 Vict. c. 4, grand jurors as well as petty jurors for the adjourned sessions. But from the point of view of appeals, where the first day of the original

sitting was not "practicable" and the appellant was not bound to enter his appeal for those sessions, it appears to be recognised in practice that he may properly enter his appeal for an adjournment of these sessions (*R.* v. *Sussex JJ.*, 1797, 7 T. R. 107; 4 R. R. 390; and see Pritchard, Q. S., 2nd ed., 451, 455). The rules of different Courts of Quarter Sessions differ on this subject. Adjourned Sessions of the Peace, even if adjourned to a different place (*R.* v. *Lancashire JJ.*, 1857, 8 E. & B. 563), are a continuance of the sessions of which they are an adjournment, and the original sessions and the adjournments are considered as making one continuous session of a single day (*R.* v. *Surrey JJ.*, 1813, 1 M. & S. 479; *Rawnsley* v. *Hutchinson*, 1871, L. R. 6 Q. B. 305). This rule does not apply to the sentences of the Court, which, under 21 & 22 Vict. c. 73, s. 12, run from the day they are pronounced, unless the Court otherwise orders. One result of the rule is that the Court may, at an adjournment, at any time before the close of a sessions, revise or vary judgments or orders given on a previous day in the sessions (*St. Andrew's, Holborn*, v. *St. Clement Danes*, 1704, 2 Salk. 494, Holt, C.J.; *R.* v. *Cockfield*, 1696, 2 Salk. 477); or they may rehear a case after decision pronounced, on the ground that the parties had been taken by surprise at the hearing, or that, subsequently, fresh material evidence had been discovered which might have affected the judgment. And while costs must be taxed in sessions unless consent is given to taxation out of sessions (*Midland Railway Co.* v. *Edmonton Guardians*, [1895] 1 Q. B. 357), taxation may be made at adjourned sessions of costs under an order made before the adjournment (*Rawnsley* v. *Hutchinson, ubi sup.*). And under sec. 20 of the Licensing Act, 1902, 2 Edw. VII. c. 28, in the case of licensing appeals the appellate Court may make orders as to certain costs at the sessions when the appeal is heard as at the next ensuing sessions, and the costs may be taxed out of sessions, subject as above stated. So soon as the adjourned sessions come to an end, the justices are *functi officio*, and matters determined cannot be reopened except by *certiorari*, or by appeal where an appeal is given by law. See also ADJOURNMENT.

A distinction must be drawn between the adjournment of sessions and the adjournment of a matter brought before sessions to a subsequent and independent sessions.

While each Court of Quarter Sessions is for some purposes an original Court, as that a matter once brought before such Court, there is a power necessarily inherent in the Court to adjourn the matter to any time, not necessarily the next sessions, at which they may consider it can better be decided; and this course may be adopted without adjourning the sessions themselves (*Keene* v. *R.*, 1847, 10 Q. B. 928; *R.* v. *Westmoreland JJ.*, 1869, L. R. 3 Q. B. 457). In the case of appeals under the Licensing Acts there seems to be no power to adjourn a case to a subsequent sessions (see *R.* v. *Beeton*, 1848, 11 Q. B. 379; 75 R. R. 423; *Ex parte Evans*, [1894] A. C. 16).

See Arch. Q. S., 5th ed., 150; Pritchard, Q. S., 2nd ed., 34, 451.

COURTS OF SUMMARY JURISDICTION.—The sittings of a Court of Summary Jurisdiction (including a Petty Sessional Court) may be adjourned by any one justice, or by the justices present, to a time and place appointed and stated in the presence of the parties or their agents (11 & 12 Vict. c. 43, s. 16), and a Court of Summary Jurisdiction, without prejudice to any other power of adjournment which it may

possess, may adjourn the hearing of any case before it to the next practicable sittings of a Petty Sessional Court. This adjournment is effected in the same manner as provided under 11 & 12 Vict. c. 43, s. 16 (see 42 & 43 Vict. c. 49, s. 20, subs. 11). The same effect may be produced by remand of a person in custody, whether charged with an indictable offence (11 & 12 Vict. c. 42, s. 21), or with an offence which can be dealt with summarily. Adjournment is the proper course where there are defects in an information which can be amended, and the allowance of the amendment might prejudice the defendant if further time were not given for his defence (*Ralph* v. *Hurrell*, 1875, 44 L. J. M. C. 145); or where the justices are equally divided in opinion on the case (*Bagg* v. *Colquhoun*, [1904] 1 Q. B. 544), provided that the power is exercised during the hearing. See also LICENSING and JURY.

See Stone, *Justices' Manual*, 38th ed., 1906; Saunders' *Practice in Magistrates' Courts*, 6th ed., by Stephenson and Lindsey, 1902.

Adjourned Summons.—See ADJOURNMENT.

Adjournment properly signifies the act of continuing the session, or postponing the deliberations of an assembly or meeting, to another time or place. Usually an adjournment is *ad diem*, to a day named, but it may also be indefinite, the Latin formula then being *Eat sine die*. Sometimes the term is employed to indicate the interval between a meeting, and its continuation on a subsequent day.

In *Parliamentary Procedure* two kinds of adjournment are distinguished—adjournment of the House and adjournment of the debate. The former is the continuation of the session from one day to another, though occasionally, as at Easter or Whitsun, the rising may be for a fortnight or even longer period. Either House adjourns independently of the other, and during an adjournment all unfinished business remains in the same state as when the House rose. An adjournment, therefore, is quite different from a prorogation (see PARLIAMENT), which is an act of the sovereign, and closes the session of both Houses, extinguishing all business under consideration at the time; and from a dissolution (see PARLIAMENT), which occurs either on the sovereign's will or by lapse of time, and means the civil death of Parliament. The Lords frequently adjourn "during pleasure," when the sitting may be resumed at any hour of the day on which such adjournment takes place, simply by the acting Lord Chancellor, in his discretion, taking his seat on the woolsack, in presence of at least two other peers. Five o'clock P.M. is fixed by usage as the hour for resuming after such adjournment, and should the House not then resume, it will stand adjourned to the usual hour on the following day. In the Commons, on the other hand, adjournment is effected by the Speaker, either when a quorum is not present (ascertained by what is known as a "count"), or upon a resolution carried by the House. It is provided by a recent amendment of Standing Order 25 (3rd April 1906) that no count shall take place during the dinner-hour, *i.e.* 8.15 P.M. to 9.15 P.M. If less than forty members be present at the hour of meeting, or if it appears, on notice being taken, or on a division of the House, or after a report from the chairman of a committee of the whole House, that less than forty members are present, then the Speaker adjourns the House until next day of meeting, without any question being first put. Otherwise, any member in possession of the House, who has not spoken

to the main question, or moved the adjournment of the debate, may move "that this House do now adjourn," or, in the case of a committee of the whole House, "that the chairman do now leave the chair;" whereupon, if this motion is seconded and affirmed, the original matter under consideration is superseded, and the House immediately adjourns, the original matter disappearing from the order book, until further directions by the House. The Commons always adjourn to a time specified. As to the adjournments of the debate: if it is desired to postpone a debate in progress, any member in possession of the House, who has not spoken to the main question, may move that the debate be now adjourned, and this motion, if seconded and affirmed, will have the desired effect. In committee it is not competent to move the adjournment of the debate, the analogous motion being, that the chairman do report progress, and ask leave to sit again. On an adjourned debate other than one in committee of the whole House being resumed, the member who moved the adjournment is in possession of the House, and has precedence if he rises at the proper time (see May, *The Law, Privileges, Proceedings, and Usage of Parliament*).

In the Commons, before the orders of the day have been reached, any member may move the adjournment of the House in order to introduce some topic which that member thinks the House should at once consider. The matter must be definite and of urgent public importance; of this the Speaker is the judge. Leave having been given, forty members must rise in their places in support before the debate on the motion can proceed (Anson, *Law and Custom of the Constitution*, 3rd ed., 1897, vol. 1, p. 250).

Since the new [1906] Parliament met there have been many discussions in the Commons on the question of procedure, with the result that a representative committee of the House was appointed to inquire into the matter. Its report is expected to lead to considerable alterations.

At *public meetings*, anyone who has not spoken on the subject under discussion may move, without notice at any time, that this meeting do now adjourn, when such motion will take precedence of questions under discussion, and, unless withdrawn, be put to the vote without debate. If seconded and carried, it should be followed by another motion, naming a time and place for the adjourned meeting, unless the meeting is one of a series, when the adjournment will be deemed to be to the next of the series. No person should move or second more than one motion for adjournment during the same debate. Where a meeting has become so disorderly that the business can no longer be carried on, it is always within the power of the chairman to adjourn, without motion put. At vestry meetings, the chairman has power to adjourn whenever necessary; and he must not exercise his power unreasonably; or he can have a poll taken, that is, have the votes of members for and against the adjournment enumerated, without regard to the number present.

Companies.—With regard to general meetings of companies limited under the Companies Acts, it is a usual clause in articles of association, that the chairman of such a meeting "may," with the consent of the meeting, adjourn the same from time to time, and from place to place, but that no business shall be transacted at any adjourned meeting, other than the business left unfinished at the meeting from which the adjournment took place. A clause in these terms is included in the model set of

regulations for a company contained in Table A in the first schedule to the Companies Act, 1862, and the rule, therefore, prevails in the absence of express modification in the articles of association. Such a clause gives the chairman a discretion. He is not bound to adjourn the meeting, even though the meeting may resolve to adjourn (*Salisbury Gold Mining Co.* v. *Hathorn*, [1897] A. C. 268). If the chairman improperly adjourns the meeting and leaves the chair, the meeting is justified in electing another chairman, and proceeding with its business (Chitty, J., *National Dwellings Society* v. *Sykes*, [1894] 3 Ch. 159). If a meeting is duly adjourned, members who remain behind cannot continue the business (*R.* v. *Gaborian*, 1809, 11 East, 77). An adjourned meeting is merely a continuance of the original meeting, and therefore if a meeting is adjourned to a subsequent day named, no fresh notice of the adjourned meeting need be given; but an adjournment may be indefinite, and in such a case the day for the adjourned meeting must be communicated by subsequent notice (*R.* v. *Mayor, etc., of London*, 1829, 9 Barn. & Cress. 1; 32 R. R. 561). If proxies are to be used on a question of adjournment, the articles should so provide. There is no right at common law to vote by proxy.

When a winding-up petition is presented against a company, the Court may adjourn the hearing conditionally or unconditionally (Companies Act, 1862, s. 86); but a winding-up petition ought not, except under special circumstances, to be ordered to stand over, the effect being to prejudice the company's credit and possibly paralyse its business (*re Chapel House Colliery Co.*, 1883, 24 Ch. D. 259). Claims by creditors in a winding-up may be adjourned into Court for argument. In such a case, if the claim is allowed with costs out of the estate, this means only the costs of adjournment. The costs in chambers must be added to the debt and proved for (*In re General Estates Co.; Ex parte Wright & Gamble*, 1869, L. R. 8 Eq. 123; and see *Holden's Case*, 1869, L. R. 8 Eq. 444).

High Court of Justice.—Adjournment of Trial.—A trial may be adjourned by a judge, if deemed expedient for the interests of justice, for such time and to such place, and upon such terms, if any, as he shall think fit (Order 36, r. 34). Application so to postpone a trial can be made at any time after notice of the trial, and not merely when the case is in the paper. It should, in the former case, be made at chambers, before a master or district registrar, and good reason should be shown for the adjournment, as, *e.g.* the absence of a material witness. If the application is opposed, it is necessary that the applicant (and especially if he be the plaintiff in the action) should show due diligence, for it is a hardship on defendants to have the hearing of causes postponed and suspended (*Steuart* v. *Gladstone*, 1877, 7 Ch. D. 394). An order is in the judge's discretion, and the exercise of this discretion will not be reviewed by the Court of Appeal (*Boucicault* v. *Boucicault*, 1888, 4 T. L. R. 195). The adjournment will usually be granted only on the terms of the applicant paying costs. Where the case was brought on in a defective state, and an adjournment was granted for the purpose of amending the proceedings, the plaintiffs were ordered to pay all costs occasioned by the action having been placed in the paper for trial (*Lydall* v. *Martinson*, 1877, 5 Ch. D. 780).

Adjournment of Motions, etc.—The hearing of any motion or application may from time to time be adjourned upon such terms as the Court or judge shall think fit (Order 52, r. 7).

Adjournment of Applications at Chambers.—It is provided by Order 54, r. 9, that any application at chambers, either by way of summons or otherwise, may be adjourned from chambers into Court, or from Court into chambers. In the Chancery Division an adjournment into Court is merely a continuation of the hearing in chambers (*Leeds* v. *Lewis*, 1858, 3 Jur. (N. S.) 1290). On an adjournment from chambers into Court, or *vice versâ*, a reservation of costs is implied without express direction to that effect (*Wallis* v. *Bastard*, 1853, 2 W. R. 47; *Dicken* v. *Hamer*, 1860, 2 L. T. 276). Evidence not tendered in chambers will not, as a rule, be accepted at the adjourned hearing in Court (*In re Marsden*; *Withington* v. *Neumann*, 1889, 40 Ch. D. 479; *In re Chefferiel*; *Chefferiel* v. *Watson*, 1888, 36 W. R. 806). Under the present practice the number of summonses adjourned from chambers into Court has largely increased, for originating summonses issued under the provisions of Order 55, r. 3, constantly raise questions of large importance which can only be properly disposed of after argument in Court. In addition, however, to summonses adjourned into Court from chambers in consequence of their importance, any case with which the Master has dealt can be adjourned to the judge either in Court or chambers, as the case may be, at the request of any party dissatisfied with the Master's ruling. Such an adjournment is not an appeal (*In re Watts*; *Smith* v. *Watts*, 1882, 22 Ch. D. 5). Although an adjournment to the judge from the Master is a matter of right, the costs are in the discretion of the judge, who has full power to order a party to pay the costs of an unnecessary adjournment (*Lloyds' Bank* v. *Princess Royal Colliery Co.*, 1900, 48 W. R. 427).

It may be noticed in connection with Order 54, r. 9, that since the Judicature Act, 1894, the power which the judge at chambers in the King's Bench Division formerly had of referring summonses to the Court is gone in those cases in which an appeal lies to the Court of Appeal. He must either make an order or refuse to make one, and give leave to appeal where he thinks fit to do so (*Hood-Barrs* v. *Cathcart*, 1895, 64 L. J. Q. B. 352).

Adjournment of Appeal.—As to application to postpone appeals, a notice issued in 1887 states that, upon production to the registrar of a consent by the solicitors of all parties, four clear days before the appeal is likely to be in the paper, with reasons, the case will be mentioned by the cause clerk to the Court, when, if the reason is sufficient, the appeal will be marked not to appear until the day agreed.

Bankruptcy.—The Court has a general discretion to adjourn any proceedings before or on any motion or application for such times and on such terms as it shall think fit (B. A., 1883, s. 105 (2); B. R., 1886-90, r. 32). Thus, where a petition is presented founded upon non-compliance with a bankruptcy notice, and an application is pending by the debtor to set aside the notice, the petition is to be adjourned until after the hearing of the application (B. R., 1886-90, r. 180). An application may be made orally and without affidavit to extend the time for hearing a petition, but no extension is to be granted beyond fourteen days from the day fixed for hearing the petition unless the Court is satisfied that such extension will not prejudice the general body of creditors (B. R., 1886-90, rr. 167, 168). After one month from the day appointed for the first hearing, no further adjournment—by consent of parties merely—is to be allowed

(B. R., 1886-90, r. 169), but an adjournment may still be allowed to answer new evidence or for the attendance of witnesses (B. R., 1886-90, r. 162). A judge or registrar has, under the rules, power to adjourn matters from chambers to Court, or from Court to chambers, and a judge can adjourn matters before the registrar to himself (B. R., 1886-90, rr. 8, 9). At every meeting of creditors the chairman may, with the consent of the meeting, adjourn the meeting from time to time and from place to place. If a quorum is not present within half an hour from the time appointed for the meeting, the chairman must adjourn it to the same day and hour in the succeeding week, or as he may appoint, though not less than seven days, or more than twenty-one days from the meeting adjourned (B. A., 1883, sched. 1, rr. 22, 24). The adjourned meeting will be at the same place as the original meeting, unless another place is specified in the resolution for adjournment (B. R., 1886-90, r. 256; Forms 91, 92). A debtor's public examination may also be adjourned from time to time (B. A., 1883, s. 7 (3)); in certain cases *sine die* (B. R., 1886-90, rr. 187, 188).

Mayor's Court.—By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 19, the Court or a judge has power, at the trial of any cause, when deemed right for the purposes of justice, to order an adjournment for such time and subject to such terms and conditions as to costs or otherwise as are deemed fit. Judgment summonses may be adjourned at the discretion of the Court to a day and time to be named. If the judgment debtor appears on the day on which the summons is adjourned, no notice need be given to him. If, however, he does not appear, notice must be sent him by post, or in such other manner as the Court may direct (Mayor's Court Rules, Order 9, r. 7).

County Courts.—Under the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 106, and County Court Rules, 1903, Order 12, r. 12, the judge has power at any time to adjourn any Court on the hearing or further hearing of any action or matter in such manner as he may think fit. The Court may at any time postpone the trial of an action on the joint application of the parties (Order 12, r. 12). The order must not be *ex parte*, but on notice under Order 12, r. 11, or by notice for directions under Order 15, rr. 1, 4. The parties cannot adjourn a case themselves (*Morgan* v. *Rees*, 1881, 6 Q. B. D. 508). Where interlocutory proceedings are contemplated or pending and cannot be concluded in time to enable the parties to prepare for trial on the day fixed, the Court has jurisdiction, if satisfied that the proceedings are necessary and proper, to postpone the trial on such terms as to costs or otherwise as may be just. The order, if made in the absence of the other party, must be served on him (Order 12, r. 13). Where it appears from the course of proceedings in any action or matter that the trial cannot be held on the return day, the Court has power to postpone the trial. Notice must be given by the registrar to all persons interested who are not present (Order 12, r. 14). Where a party has omitted to do something required by the practice of the Court to be done either before or during the trial, the Court may adjourn the trial on terms, if it thinks fit, in order to allow the party to comply with the practice. Order 10, r. 10, empowers the judge to adjourn the trial to allow a defendant who has not given the requisite notice of a special defence to do so. If notice of demand for a jury has not been given in due time, or if at the trial both parties

desire a jury, the judge may adjourn the case, on terms, in order that notice may be given. If, however, the case is adjourned for any other reason, the parties have no right to have a jury summoned for the adjourned hearing, though the judge has a discretion to allow one (*Fletcher* v. *Baker*, 1874, L. R. 9 Q. B. 372; *R.* v. *Registrar of Leeds C. C.*, 1886, 16 Q. B. D. 691). As to power of adjournment when assessors do not attend, see Order 21, r. 11. As to adjournment for amendment of parties, see Order 14, r. 11, and *Hancocks* v. *Lablache*, 1878, 3 C. P. D. 197. Powers of adjournment also exist where short service has been obtained owing to a defendant being about to move out of the district (Order 6, r. 9); when the service of a summons has come to the knowledge of the defendant less than ten clear days before the return day (Order 7, r. 28); in order to allow the trustee to elect whether to continue the action or not when the plaintiff has become bankrupt (County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 94); when another action by the same plaintiff for the same cause is pending in another Court (Order 22, r. 11); for the proof of documents (Order 12, r. 9). When a judge does not attend owing to death or unavoidable absence, the registrar, after dealing with cases in which he has jurisdiction, or failing him, the high bailiff, must adjourn the Court (C. C. Act, 1888, 51 & 52 Vict. c. 43, s. 10).

Lastly, in *criminal trials*, when a case is not finished in one day the Court has the power to adjourn to the next or another day. The ordinary practice is to adjourn until the following morning. On such adjournment, if the indictment is for treason, treason-felony, or murder, the jury are put under the sworn custody of an officer of the Court and kept under surveillance, so that they may not hold communication with third parties (33 & 34 Vict. c. 77, s. 23). In the case of other felonies the jurors may be (60 & 61 Vict. c. 28), and in the case of misdemeanors they usually are, allowed to separate, on undertaking not to converse with anyone about the trial. It is also usual to adjourn when material witnesses are absent; and should a trial have been partly heard, the jury will be locked up in the interval (*R.* v. *Foster*, 1845, 3 Car. & Kir. 201). The Court frequently adjourns, too, while the jury are considering their verdict, reassembling to receive the same. See Arch. Cr. Pl., 23rd ed., 213, 222.

The powers of justices of the peace with respect to adjournment in matters done out of General or Quarter Sessions (see ADJOURNED SESSIONS) depend upon statute.

Where the justices are holding a preliminary inquiry as to an indictable offence they cannot proceed in the absence of the accused; but where he has appeared, or been brought in custody, before them, they have power (where it becomes advisable from the absence of witnesses or any other reasonable cause) to remand the accused to prison by verbal order for a period not exceeding three days, or by warrant for a period not exceeding eight clear days, and may order him to be brought up again at the end of the period during which he is remanded (11 & 12 Vict. c. 42, s. 21). There is some diversity of opinion and practice as to remanding or adjourning for more than eight days when the accused is admitted to bail (Glen's *Summary Jurisdiction Acts*, 8th ed., by Douglas, p. 364). Justices can also adjourn a case at the request of the defence, where there are variances between the evidence and the summons or warrant of such a character as to deceive or mislead the

accused (11 & 12 Vict. c. 42, s. 9). Where any person is charged with an indictable offence which can be dealt with summarily (under the Summary Jurisdiction Acts of 1878 or 1899), the Court may, for the purpose of ascertaining whether it is expedient to deal with the case summarily, adjourn the case and remand the accused, or if, not being a Petty Sessional Court, they think the case should be summarily dealt with, they may adjourn the case to the next practicable sitting of a Petty Sessional Court. In the latter case the period of adjournment may exceed eight days (42 & 43 Vict. c. 49, s. 24).

In ordinary summary jurisdiction cases, the justices may, if they think fit, in the presence of the parties or their representatives, direct an adjournment, either allowing the defendant in the meantime to go at large, or committing him to safe custody, or discharging him upon recognisance, with or without sureties (11 & 12 Vict. c. 43, s. 16); and where the justices are not sitting as a Petty Sessional Court they may adjourn the case to the next practicable sitting of a Petty Sessional Court (42 & 43 Vict. c. 49, s. 20 (11)). These enactments do not impose any limit on the length of the adjournment; but where the accused is in custody, the time limited under 11 & 12 Vict. c. 42, s. 21, would be adopted. An adjournment for an unreasonable time would be equivalent to a refusal to adjudicate; and where a statute requires a conviction within a limited period, adjournments will be granted with caution. Justices appear to have no power to continue recognisances, and fresh recognisances will be entered into on each adjournment. If either or both parties fail to appear at the adjourned hearing, the Court may proceed as if the parties were present, and dismiss the complaint with or without costs (11 & 12 Vict. c. 43, s. 16), or adjourn it for a reasonable time (s. 13). As to the non-appearance of a defendant, "justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong ground for believing that the summons has reached him, and that he is wilfully disobeying it" (Cockburn, C.J., in *R.* v. *Smith*, 1875, L. R. 10 Q. B. 608). If not satisfied, they should always adjourn the hearing, and have a fresh summons issued, or otherwise inform defendant of the postponement. If, in point of fact, the summons has not been actually served, a *certiorari* (*q.v.*) will lie to quash the order (*Ex parte Rice Jones*, 1850, 1 L. M. & P. 357). If satisfied that the summons was properly served, the justices may proceed in absence, or issue a warrant for defendant's apprehension, and adjourn the case. A defendant cannot claim an adjournment as of right, to enable him to obtain professional assistance (*Ex parte Biggins*, 1862, 26 J. P. 244); but if the charge has been varied, or if a variance appears between the evidence and the information, complaint, or summons, he may ask for time to prepare his defence, and this ought not, under ordinary circumstances, to be refused him (11 & 12 Vict. c. 43, s. 1). The same justices need not sit at the adjourned sessions as were originally present, but if the Court is differently constituted, the evidence previously given should be repeated on oath.

As to adjournment of Licensing Sessions and Special Sessions, see these titles.

Adjudication.—See BANKRUPTCY.

Adjustment of Average.—See AVERAGE.

Adjustment of Rights of Contributories.—See COMPANY.

Admeasurement of Dower.—A writ by which an heir could obtain redress against the widow of his ancestor, where the heir, in his infancy, or his guardian, had assigned her more land as her dower than she ought to have. The heir could have no admeasurement if he was of full age at the time when he made the assignment. If the heir, before his guardian entered the land, assigned to the widow an excess of land as dower, he could have no admeasurement during his infancy; but the Stat. Westm. ii. c. 7, granted a writ of admeasurement to his guardian. Forms of writs of admeasurement of dower are given in *Registrum Omnium Brevium*, 1595, at p. 171*a*. See HUSBAND AND WIFE.

Admeasurement of Pasture.—A writ brought by a commoner where another commoner had surcharged his common by putting on more beasts than he lawfully might. Under this writ, a jury was summoned to declare how many beasts each commoner might put on the common, and the rights of the commoners generally. The lord could not bring a writ of admeasurement against a tenant, nor a commoner against his lord. For the form of the writ, see *Registrum Omnium Brevium*, 1595, p. 156*b*. See COMMON.

Ad medium filum viæ.—Where the boundary between two properties, parishes, counties, etc., is a non-navigable river, a road or a ditch, the respective proprietors or authorities are presumed to have control up to an imaginary line or thread (*filum*), drawn through the centre of such river, road, or ditch. See WATERWAY.

Ad melius inquirendum.—A writ which in certain cases lies for directing a second inquisition or inquiry, where the first has been unsatisfactory.

In the case of inquisitions by coroners, the use of the writ has been largely superseded by the powers of the Coroners Act, 1887, 50 & 51 Vict. c. 71, s. 5. See CORONER.

Rules 14 and 15, made under the Escheat Procedure Act, 1887, 50 & 51 Vict. c. 57, provide that a *melius inquirendum* may be awarded from time to time on the fiat of the Attorney-General; or the Lord Chancellor may, in any case of escheat, award a *melius inquirendum*. In lunacy inquisitions, writs *ad melius inquirendum* are not now directed (*Ex parte Cranmer*, 1806, 12 Ves. 454; 33 E. R. 171; *Ex parte Roberts*, 1743, 3 Atk. 5; 26 E. R. 806; *Ex parte Atkinson*, 1821, Jac. 333; 37 E. R. 877; *In re Holmes*, 1827, 4 Russ. 182; 38 E. R. 775; 28 R. R. 42; Shelford on *Lunatics*, 2nd ed., 142). See LUNACY.

The Crown cannot traverse an inquisition, but a *melius inquirendum* may be granted on behalf of the Crown.

On this subject generally, see *R.* v. *Bunney*, 1688, 1 Salk. 190; *R.* v. *Curtis*, 1876, 45 L. J. Q. B. 711; Short and Mellor's *Crown Office Practice*, 1890; Jervis on *Coroners*, 1898.

Administering Drugs.—1. Where drugs are administered for a lawful purpose, but with "gross" negligence and fatal results, the

person by whose negligence they were taken is indictable for manslaughter, whether he be or be not a qualified chemist or medical practitioner (*R.* v. *Webb*, 1834, 1 Mood. & Rob. 405; *R.* v. *Spencer*, 1867, 10 Cox C. C. 525; and see as to liability for *mala praxis*, Beven, *Negligence*, 2nd ed., 1390-1406). 2. As to the administration of drugs with intent to murder, to endanger life, cause grievous bodily harm, or to injure, aggrieve, or annoy, see POISON. 3. As to administering drugs with intent to cause miscarriage, see ABORTION. 4. It is felony by statute (24 & 25 Vict. c. 100, s. 23) unlawfully to apply or administer to, or cause to be taken by, or to attempt to apply or administer to, or cause to be taken by, any person, any chloroform, laudanum, or other stupefying drug, matter, or thing, with intent to commit, or enable another to commit, or to assist in committing, any indictable offence. The offence is punishable by penal servitude for life, or any term not less than three years, or by imprisonment for not more than two years (24 & 25 Vict. c. 100, s. 22; 54 & 55 Vict. c. 69, s. 1), and is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1). There are no reported cases on this enactment. The offence is popularly called hocussing, and is usually committed to facilitate robbery. Sexual intercourse with a woman stupefied by drugs being rape (*R.* v. *Camplin*, 1845, 1 Den. Cr. C. 89), administration of stupefying drugs to a woman, with intent to overcome her resistance to sexual intercourse, would apparently fall within 24 & 25 Vict. c. 100, s. 22. But it is also a misdemeanor by statute (48 & 49 Vict. c. 69, s. 3 (3)), to apply, administer to, or cause to be taken by any woman or girl any drug, matter, or thing with intent to stupefy or overpower so as to enable any person to have unlawful sexual connection with such woman or girl. The offence is punishable by imprisonment for not more than two years, with or without hard labour (*ibid.* s. 3). The offence is not triable at Quarter Sessions (*ibid.* s. 17). The offender, if convicted, may be ordered to pay the costs of the prosecution (*ibid.* s. 18). The husband or wife of the accused may be called for the prosecution without the consent of the accused (61 & 62 Vict. c. 36, s. 4). No conviction of this offence may take place on the evidence of one witness only, unless the witness is corroborated in some material particular implicating the accused (*ibid.*). See RAPE.

Administration Action.—*Original Jurisdiction of Court of Chancery.*—The jurisdiction of the Court of Chancery to compel due administration of the personal estate of deceased persons has existed from a very early period. It seems to have been of gradual growth, and founded rather on the necessity of supplying the defects of the Courts of common law and the ecclesiastical Courts, than on execution of trusts cognisable in equity alone.

In the Courts of common law a creditor could merely establish his debt; and, as to the deceased's assets, could not obtain discovery of them, or reach them, if equitable, or marshal them, where such course was necessary for payment of his debt. See EXECUTORS AND ADMINISTRATORS.

The jurisdiction of the Court of Chancery to administer assets and distribute residues, gradually acquired to meet and supplement the defects of other tribunals, was firmly established in the reign of Charles II., when it was held to be unaffected by the Statute of Distributions, on the ground that the Court afforded a more complete and

effectual remedy; and thus the Court acquired practically an exclusive jurisdiction. (See Spence, *Equity*, vol. i. p. 578 *et seq.*; Story, *Equity Jurisprudence*, 2nd English ed., p. 352 *et seq.*) The jurisdiction of the Court of Chancery as a Court of conscience operated *in personam*, and not *in rem*, and accordingly extended to compel the performance of trusts by executors and trustees personally subject to its jurisdiction, though the subject was not within the jurisdiction, and though the author of the trust might have had a foreign domicile (see *Penn* v. *Baltimore*, 1750, 1 Ves. Sen. 444; 27 E. R. 1132, and notes to that case in 1 Wh. & T., L. C. 7th ed., p. 755 *et seq.*); and accordingly it was always the practice of the Court to decree administration in all such cases. The jurisdiction was not discretionary (at all events in England), and under a long series of precedents the plaintiff in a suit properly constituted had a right *ex debito justitiæ* to a decree (see *Ewing* v. *Orr Ewing*, 1883, 9 App. Cas. 34; and *In re Blake; Jones* v. *Blake*, 1885, 29 Ch. D., at p. 916). It is not proposed here to discuss the methods in which the jurisdiction of the Court was exercised under the old practice. The curious in such matters are referred to the earlier editions of Daniell's *Chancery Practice* and Seton on *Decrees*. All that will be attempted here will be to give a brief sketch of the modern system of administration.

Jurisdiction under Judicature Acts.—By the Judicature Act, 1873, s. 34, the administration of the estates of deceased persons and the execution of trusts were assigned to the Chancery Division of the High Court.

Modes of Obtaining an Order for Administration.—Proceedings for administration may be commenced (1) by writ of summons; (2) by originating summons under Order 55, rr. 3, 4.

Frame of Action.—In either case the writ or summons, as the case may be, must be intituled "In the matter of the estate of A. B., deceased (*Eyre* v. *Cox*, 1876, 24 W. R. 317), or, where administration of a trust or settlement is claimed, "In the matter of the trust [or settlement]" (P. M. R. 3).

Where the plaintiff is suing as a creditor, and desires to have the realty administered, he must sue on behalf of himself and all other the creditors (*Worraker* v. *Pryer*, 1876, 2 Ch. D. 109; *In re Royle; Fryer* v. *Royle*, 1877, 5 Ch. D. 540; *Eyre* v. *Cox*, 1876, 24 W. R. 317). Where the writ fails to show this, the fact must appear on the title to the statement of claim (*In re Tottenham; Tottenham* v. *Tottenham*, [1896] 1 Ch. 628). On the other hand, where only personal estate is sought to be administered, the plaintiff need not sue on behalf of the other creditors (*In re Blount; Nayler* v. *Blount*, 1879, 27 W. R. 865; *In re Greaves; Bray* v. *Tofield*, 1881, 18 Ch. D. 551, 554).

The representative capacity of any party, plaintiff or defendant, suing or sued in such capacity, must be shown (Order 3, r. 4).

Proceedings Commenced by Writ.—An action for administration commenced by writ is brought to trial in the usual way. The rules of Court, however, provide that where the writ is endorsed for an account under Order 3, r. 8, an order may be obtained in a more summary way. For in such case, if the defendant fails to appear, or after appearance fails to satisfy the Court that there is some preliminary question to be tried, an order may be obtained at chambers, with all necessary inquiries and directions usual in the Chancery Division in similar cases

(Order 15, r. 1). Only common accounts and inquiries will be directed under this rule (*In re Gyhon; Allen* v. *Taylor*, 1885, 29 Ch. D. 834). The Court, in the exercise of the discretion conferred on it by Order 55, r. 10, may refuse to make an order for general administration (*In re Gyhon, supra; Campbell* v. *Gillespie*, [1900] 1 Ch. 225). Applications for orders for administration under Order 15 are not now of frequent occurrence, owing to the facilities afforded for obtaining relief by originating summons. [See further, ACCOUNTS AND INQUIRIES.]

Proceedings Commenced by Originating Summons.—It may be observed, in passing, that this mode of obtaining an order for administration is not a creature of the rules under the Judicature Acts, for the originating summons was introduced by 15 & 16 Vict. c. 86, s. 45, and was confined to the simple case of an order for the administration of the personal estate of a dead man. Order 55 of R. S. C., 1883, has greatly enlarged the scope of the originating summons, and has extended its operation to the execution of trusts (*per* Chitty, J., *In re Busfield; Whaley* v. *Busfield*, 1886, 32 Ch. D. pp. 125, 126).

Form and Issue of Summons.—The summons originating the proceedings should be in the form prescribed by the rules (R. S. C., App. K., No. 1A). It is issued by being sealed in the Central Office (Order 54, r. 4B), and is assigned to one of the judges of the Chancery Division (Order 5, r. 9 (*b*)). It must be borne in mind that the procedure by originating summons is subject to important limitations. Such a summons cannot be served out of the jurisdiction (*In re Busfield; Whaley* v. *Busfield*, 1886, 32 Ch. D. 123). Third party procedure, under Order 16, rr. 48-55, does not apply to proceedings commenced by this method (*In re Wilson; Att.-Gen.* v. *Woodall*, 1890, 45 Ch. D. 266). Upon an originating summons the Court cannot, except by consent, make an order for administration founded on breach of trust or wilful default (*Dowse* v. *Gorton*, [1891] A. C. 190). And the Court of Appeal held, in a case of *In re Powers; Lindsell* v. *Phillips*, 1885, 30 Ch. D. 291, that an originating summons is not the proper way of trying a disputed debt, nor of dealing with a dispute as to facts (*Nutter* v. *Holland*, [1894] 3 Ch. 408). Care, therefore, is required, before issuing the summons, to see that the case is not open to any of these objections, or the plaintiff may find it necessary at a later stage to abandon his proceedings and commence *de novo* by way of writ.

Hearing of Summons.—After appearance has been entered to the summons, or default in appearance has been made, a notice of the day and hour for attendance (under Order 54, r. 4D) must be served on the parties appearing and filed against such of the defendants, if any, as are in default. It must be served not less than four clear days before the return day. On the return of the summons the Master will satisfy himself that the necessary parties are before the Court, and, if the application is opposed, will fix times for filing the evidence by the various parties. When the matter is ripe for adjudication, the Master will adjourn the summons to the judge, either in Court or in chambers, according to the nature of the case; for, by the terms of Order 55, r. 15A, no order for general administration, or for the execution of a trust, or for accounts or inquiries concerning the property of a deceased person, or other property held upon any trust, or concerning the parties entitled thereto, can be made except by the judge in person.

Parties.—By the Chancery Procedure Act, 1852, 15 & 16 Vict. c. 86,

s. 42, provision was made enabling parties interested to obtain a decree for administration without serving others of the same class. These provisions are in effect repeated by Order 16, rr. 33-38. In the case of proceedings commenced by originating summons, the executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin, or heir-at-law or customary heir of a deceased person, or as *cestui-que trust* under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person, may apply for the determination, without an administration of the estate or trust, of any of the following questions or matters:—

(*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin or heir-at-law, or *cestui-que trust:*

(*b*) The ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others:

(*c*) The furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts:

(*d*) The payment into Court of any money in the hands of the executors or administrators or trustees:

(*e*) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees:

(*f*) The approval of any sale, purchase, compromise, or other transaction.

(*g*) The determination of any question arising in the administration of the estate or trust (Order 55, r. 3).

Any of such persons may apply for and obtain an order for—

(*a*) The administration of the personal estate of the deceased:

(*b*) The administration of the real estate of the deceased:

(*c*) The administration of the trust.

All the legal personal representatives of a deceased person whose estate is sought to be administered must be parties, and in an action to administer a trust all the trustees must be before the Court.

The persons to be served with an originating summons under Order 55, rr. 3, 4, are, where the summons is taken out by an executor, or administrator, or trustee, the persons interested under clauses (*a*) to (*g*), *supra*, or some of them, or, where general administration is sought, the residuary legatees or next-of-kin, or residuary devisees or heirs, or the *cestuis-que trustent*, or some of them. And in such case, if all the executors, or administrators, or trustees, do not concur in taking out the summons, it must be served on those who do not concur.

Where the summons is taken out by any person other than the executors, administrators or trustees, it must be served on such executors, administrators or trustees (Order 55, r. 5).

Directions may be given for service on other parties (r. 6). If any such directions are given, the new parties must be brought in by amendment of the summons.

In cases where the right of an heir-at-law, customary heir, or next-of-kin, or a class, depends upon the construction of an instrument, and where it is not known or difficult to ascertain who is or are such heir-

at-law, customary heir, or next-of-kin, or class, the Court may appoint some person to represent such heir-at-law, customary heir, next-of-kin, or class (Order 16, r. 32 (*a*)); and may, in other cases, appoint a class representative (*ibid.* (*b*)). The persons represented are in each case bound by a judgment or order made in the presence of the class representatives. As to the effect of such orders, see *May* v. *Newton*, 1887, 34 Ch. D. 347; *In re Lart; Wilkinson* v. *Blades*, [1896] 2 Ch. 788.

After a judgment or order has been made, parties not already before the Court may be bound by being served with notice of the judgment or order, under Order 16, r. 40. A person so served may, within one month, apply to discharge, vary or add to the judgment or order (*ibid.*). He may also attend the proceedings upon entering an appearance in the Central Office (Order 16, r. 41). If he fails to enter an appearance he is not, under ordinary circumstances, entitled to any further notice of the proceedings (*In re Rolfe; Fyson* v. *Johnson*, 1894, 70 L. T. 624).

The Judgment or Order.—It does not fall within the scope of this article to speak of the various forms which an order made by the Court under the procedure which we have been considering can take. The reader is referred to Seton on *Judgments and Orders*, that invaluable authority on questions of procedure in the Chancery Division, for information on this subject. It may, however, be pointed out that, upon the hearing of an originating summons issued under the provisions of Order 55, rr. 3, 4, the Court or a judge can pronounce such judgment as the nature of the case may require (Order 55, r. 8). Moreover, the Court now possesses a much larger discretion than was the case under the old practice. For it is not obligatory on it to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can properly be determined without such judgment or order (r. 10). Under this rule the Court can restrict the order simply to those points necessary for determination of the question in dispute; and a party interested is entitled to an administration judgment only where there are questions which cannot otherwise be determined (*In re Blake; Jones* v. *Blake*, 1885, 29 Ch. D. 913). The proceeding by summons for inquiries or directions without administration is exactly equivalent to the old practice of commencing an administration suit, raising the particular point by the pleadings, getting an inquiry or direction upon that point, and then staying further proceedings in the suit (*Per* Fry, L.J., *In re Medland; Eland* v. *Medland*, 1889, 41 Ch. D. 492). Moreover, the Court, in the exercise of its discretion as to costs (under Order 65, r. 1), may order the plaintiff to pay the costs of any unnecessary or improper administration proceedings (*In re Blake; Jones* v. *Blake, ubi sup.*), and may order the trustees to pay costs which are occasioned by their gross or indefensible neglect to render proper accounts of their trust (*In re Skinner; Cooper* v. *Skinner*, [1904] 1 Ch. 289). In further pursuance of the policy of the modern practice to limit the expense of administration proceedings as much as possible, it is provided that, upon an application for administration or execution of trust by a creditor or beneficiary under a will, intestacy, or deed of trust, where no accounts or insufficient accounts have been rendered, the Court may (*a*) order the application to stand over, and

that the executors, administrators or trustees do render, in the meantime, to the applicant a proper statement of their accounts, with an intimation that if this is not done they may be made to pay the costs of the proceedings; and, (*b*) where necessary to prevent proceedings by other creditors, or by persons beneficially interested, may make the usual judgment or order for administration; with a proviso that no proceedings are to be taken under such judgment or order without the leave of the judge in person (Order 55, r. 10A). Both these provisions are very constantly resorted to. It has, indeed, been questioned by Kekewich, J., whether the practice of directing accounts to be furnished and vouched out of Court does not lead to additional expense (*In re Brown; Benson* v. *Grant*, 1895, W. N. 115). Trustees who are required to furnish accounts of their trust estate are entitled to be guaranteed against the expense of complying with the requisition (*In re Bosworth; Martin* v. *Lamb*, 1889, 58 L. J. Ch. 432.)

Frame of a Judgment for General Administration.—Order 33, r. 6, provides that every judgment or order for a general account of the personal estate of a testator or intestate shall contain a direction for an inquiry, what parts (if any) of such personal estate are outstanding or undisposed of, unless the Court shall otherwise direct, and rule 7 requires that where, by any judgment or order, any accounts are directed to be taken or inquiries to be made, each such direction shall be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number. The object of this provision is that the numbered paragraphs of the judgment and of the Master's certificate (as to which see below) may correspond. (For forms of judgments and inquiries, see 2 Seton, 6th ed., pp. 1390-1394, 1465-1476, and R. S. C., App. L., No. 28.)

Working out the Judgment.—The usual course of procedure where a judgment or order for general administration has been made is as follows:—Within ten days after the judgment or order has been passed and entered, it must be brought into chambers by the party having carriage of it. A summons is then issued to proceed upon it. On the return of the summons, the Master in the chambers of the judge to whom the action is assigned, if satisfied that all necessary parties are before him, or have been served with notice of the judgment, will give directions as to the manner in which the accounts and inquiries are to be prosecuted, and by whom the evidence answering them is to be brought in (Order 55, rr. 32, 33). Service may in certain cases be dispensed with, or substituted service ordered (r. 35). In order to save the expense caused by the attendance of numerous parties having similar interests, a classification order may be made, under which a solicitor acting for one party may be directed to represent, for the purpose of the inquiries, other parties in the same interest (r. 40). In order to ascertain the debts proveable against the estate, or the persons entitled to share in it, advertisements, where necessary, are inserted in the *London Gazette* and such other newspapers as are directed by the Master, for creditors and claimants to come in and prove their claims within a limited period (r. 44). In the case of advertisements for claimants other than creditors, the advertisement is settled in chambers, but an advertisement for creditors is prepared by the party having conduct of the proceedings (r. 46). The legal personal representative of the deceased examines the claims of creditors, and files an affidavit in the prescribed

form, verifying them, and stating which of such claims are proper to be allowed, and which ought to be proved; or, if no claims are sent in, an affidavit to that effect is produced (r. 52). On the appointed day the claims are adjudicated on, and either allowed or disallowed, or further investigation is directed; and the legal personal representative is directed to give notice to creditors whose debts are disputed to attend and prove their claims (r. 56). It may be noted in passing that, as a rule, no person other than the legal personal representative is allowed to attend on the claims of any person against the estate in respect of any debt or liability (Order 16, r. 47). The personal representative prepares the accounts and verifies them by affidavit, stating also the amount of the deceased's funeral expenses, and the particulars of his estate at the date of his death and at the time of swearing the affidavit. (As to the forms of the account and affidavit, see Order 33, r. 4, App. L., Nos. 11-13.) The accounts are vouched in chambers, as to which special directions may be given (Order 33, r. 3). On taking an account all just allowances must be made (*ibid.* r. 8). The accounting party may be surcharged (*ibid.* r. 5). The accounts and inquiries having been duly taken and answered, the Master states the result in his certificate, which is signed by him and filed, and becomes binding on all parties, unless a summons to vary it is taken out within eight days after the filing (Order 55, rr. 65, 71). The certificate follows the numbering of the judgment or order, as mentioned above, and under a judgment or order for general administration states—(1) the result of the personal estate account, referring to the account as verified by affidavit, with such variations as may have been made therein; (2) the testator's debts, with interest, which in the case of an insolvent estate will not be calculated beyond the date of the judgment (*In re Summers; Boswell* v. *Gurney*, 1879, 13 Ch. D. 136); (3) the funeral expenses; (4) the legacies, with interest, and annuities bequeathed by the testator; (5) the outstanding personal estate; (6) the real estate; (7) the incumbrances on the real estate; (8) the result of the accounts of rents and profits of the real estate. Each finding in the certificate is followed by a statement of the evidence produced on the account or inquiry (see Dan. *Ch. Forms*, 5th ed., No. 1412).

Further Consideration.—After the expiration of the above-mentioned period of eight days, the action may be set down on further consideration; and if not so set down by the party having the conduct of the proceedings within fourteen days from the filing of the certificate, it may be set down by any other party. The action will not be put in the paper for hearing until after ten days from the day on which it was set down, and notice must be given to the other parties at least six days before the day fixed for the hearing (Order 36, r. 21). At the hearing the Court will make such order and give such directions as are rendered necessary by the findings in the Master's certificate, and, if necessary, further accounts and inquiries will be directed, and further consideration of the action again adjourned. All questions of costs are usually disposed of at the hearing on further consideration. Where the matter originated in chambers, the further consideration may be dealt with there, if it was by the order adjourned for further consideration in chambers (Order 55, r. 72). In the case of an insolvent or intestate's estate, the further consideration can in all cases be heard in chambers (r. 2 (16)).

As to the distinction between legal and equitable assets, and the order in which they are liable for the payment of debts, see ASSETS and MARSHALLING.

As to the costs of administration proceedings, see Dan. *Ch. Pr.*, 7th ed., ch. xviii.; Seton, 6th ed., pp. 1512-1519, and COSTS.

Beneficial Results of Modern System.—It is beyond doubt that the modern practice with regard to administration has done much to diminish the tedious delays and serious expense which resulted from the less elastic procedure of the Court of Chancery. In particular, the jurisdiction by originating summons and the rules regulating its service have conferred on the Court the power of determining with directness and dispatch questions which were formerly only dealt with after costly, and often unnecessary, accounts and inquiries had been taken and answered. One marked feature in the present system is the diminution in the number of accounts taken in chambers since the introduction by the Rules of 1883 of the present system of procedure (see further on this point, CHAMBERS—CHANCERY DIVISION). That the suitors of the Court have not been slow to avail themselves of the advantages offered to them by this system may be gathered from the following facts culled from the Judicial Statistics for the year 1903. In that year no less than 1054 summonses for administration were issued in the Chancery Division, whilst the number of writs for all purposes issued during the same period in that Division only amounted to 3903. Is it too much to hope that the day may yet come when the benefits of this most useful form of procedure will be still further extended by the removal of the present unreasonable restrictions which compel a plaintiff to have recourse to the more costly procedure by way of writ whenever it is necessary to join as a defendant a party resident outside the jurisdiction of the Court?

Jurisdiction of County Courts.—Under the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 67, the County Court has all the powers and authorities of the High Court in actions or matters by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs-at-law, or next-of-kin, in which the personal or real or personal and real estate, against or for an account or administration of which the demand may be made, does not exceed in amount or value the sum of £500; and for the execution of trusts in which the trust estate or fund does not exceed in value the same amount; and in all such actions or matters the County Court judge has all the powers and authorities, for the purposes of the Act, of a judge of the Chancery Division. If, during the progress of any such action or matter, it appears that the subject-matter exceeds the limit of £500, the validity of any order already made is not affected, but the judge must transfer the action or matter to the Chancery Division (s. 68). (For the County Court practice, see Thompson, *Principles of Equity and Equity Practice of the County Court*, p. 237 *et seq.*)

Jurisdiction in Bankruptcy.—Under sec. 125 of the Bankruptcy Act, 1883, and sec. 21 of the Bankruptcy Act, 1890, provisions are made for the administration in bankruptcy of the estate of a deceased insolvent on the petition of any creditor whose debt would have been sufficient to support a bankruptcy petition against him. No such petition can be presented after administration proceedings have been commenced in any Court; but that Court may, on proof of the insolvency of the estate,

transfer such proceedings to the Court exercising jurisdiction in bankruptcy. The power of transfer is discretionary (*In re Weaver; Higgs* v. *Weaver*, 1885, 29 Ch. D. 236; *In re York; Atkinson* v. *Powell*, 1887, 36 Ch. D. 233; *In re Baker; Nichols* v. *Baker*, 1890, 44 Ch. D. 262). Upon the order being made, the debtor's property vests in the official receiver as trustee, who realises and distributes it in accordance with the provisions of the Act; and the accounts, list of creditors, etc., are made and verified in accordance with the practice in the Chancery Division. (See Williams, *Bankruptcy*, 8th ed., pp. 353-358; and Bankruptcy Act, 1890, s. 21; Bankruptcy Rules, 277-279A; see also BANKRUPTCY.)

Authorities.—Daniell's *Chancery Practice*, 7th ed., 1901; Daniell's *Chancery Forms*, 5th ed., 1901; Seton's *Judgments and Orders*, 6th ed., 1901; Spence's *Equitable Jurisdiction*, 1846; Story's *Equity Jurisprudence*, 2nd English ed., 1892; Thompson's *Principles of Equity and Equity Practice of the County Court*, 1896; Williams, *Bankruptcy Practice*, 8th ed., 1904; *The Annual Practice*, 1906.

Administration Bond; Administrators.—See EXECUTORS AND ADMINISTRATORS.

Administrative Areas.—See LOCAL GOVERNMENT.

Administrative County.—The expression "administrative county" means the area for which a county council is elected, in pursuance of the Local Government Act, 1888, s. 100; *e.g.* London is a county of itself. In Cambridgeshire there are two administrative counties —(*a*) Isle of Ely; (*b*) rest of the county. In Yorkshire each riding; and in Lincolnshire each of three "parts" is a separate administrative county. Similarly, the "Soke of Peterborough" is cut away from the county of Northampton, the Isle of Wight from Hampshire, and the Scilly Isles from Cornwall. Sussex and Suffolk are cut in half, the east and west portions being each an administrative county of itself.

The areas of all administrative counties are liable to continual alteration—(1) by the withdrawal of any portion erected into a county borough; (2) by the extension of a county borough into the administrative county area; and (3) by giving up to another county, or taking away from it, small areas on the boundary line. See Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 54. See LOCAL GOVERNMENT.

Admiral.—An admiral is an officer of the Crown, exercising its jurisdiction by sea. The name is not found before the time of the Crusades, and it is generally derived from the Arabic *emir* (which is favoured by the French form of the same word *amiral*, and Milton's spelling it as *ammiral* in the *Paradise Lost*). It seems that there was, in early times, an officer of State entrusted by the Crown with the command and charge of the sea, known as *custos maris*, or *locum tenens regis super mare*, and in the reign of Edward I. as "the admiral." During this reign there seem to have been also three or four admirals appointed for the English seas, with particular limits to the command of each one, and there was an admiral of the Cinque Ports. See CINQUE PORTS. The first admiral so called in England is said to have been William de Leybourne in 1286; and the first admiral of England, so called, seems to have been Sir Thomas Beaufort, half-brother of Henry IV., who was

made admiral of the fleet and admiral of England, Ireland, and Aquitaine for life in 1408; though by another account Richard Fitz Mar, Earl of Arundel and Surrey, in Richard II.'s reign in 1386, was the first to have this title. The best account of the admiral's office is given by Sir John Nicholl, Judge of the Admiralty Court, in the case of *R.* v. *Forty-nine Casks of Brandy*, 1836, 3 Hag. Adm. 257. "In early times there were occasionally more Lord-Admirals than one, not, however, of the same part of the coast, but one from the Thames northward, and one thence southward, besides the Lord Warden of the Cinque Ports, but not interfering with each other. Which, however, was the more ancient form of executing this office, whether by one officer or several, is mere conjecture, and it is so stated in the Matter of the Whale (*Lord Warden of the Cinque Ports* v. *The King in his Office of Admiralty*, 1831, 2 Hag. Adm. 438, Dr. Phillimore). But however that may be, I am not aware that more than one Lord Admiral has been appointed since the time of Henry VIII., and the statute only speaks of the Lord Admiral." The office is in part executive and in part judicial. The Lord Admiral was to fit out and manage all the marine force of the country, to build ships, to appoint officers, to command the ships at sea by himself and his officers. His judicial duties were to be executed by his lieutenant, as judge of the Court, who had jurisdiction over all matters arising upon the high seas, and was appointed by the Lord High Admiral, till the time of William and Mary, when Lord Pembroke was appointed by the Crown under the Great Seal and for life. The patent of Lord Pembroke grants to him during pleasure, as all these offices are granted, the office of Lord High Admiral of England, Ireland, and Wales, and all dominions and territories, enumerating those in parts beyond the seas thereto belonging. It gives him all rights, perquisites, and jurisdictions of the office, among them derelicts, flotsam, jetsam, lagan; it also gives him the command of the forces at sea, the appointment of officers, and the direction of building, repairing, fitting out, and manning all ships of war. Since 1660 there have been only four Lord High Admirals—the Duke of York, under Charles II.; the Earl of Pembroke, under William III.; Prince George of Denmark, under Anne; and the Duke of Clarence, under George IV., who was assisted by a council (7 & 8 Geo. IV. 65); and since 1827 the office has been in commission. The administrative powers of the office are now exercised by the Admiralty, and the judicial by the Admiralty Division. (See ADMIRALTY, THE, and ADMIRALTY DIVISION.)

The Crown also in former times made grants to certain persons to be admirals or exercise Admiralty jurisdiction within certain places independently of the Lord High Admiral; but any military power that they may have had has long ceased to exist, and their Admiralty jurisdiction only extends to the civil rights conferred on them, such as the rights to wrecks or other droits of Admiralty found within the limits of their manors, and these rights are now controlled by the general statutory provisions as to wrecks (M. S. A., 1894). In the case of *R.* v. *Forty-nine Casks of Brandy, supra*, the successor in title of Sir Christopher Hatton, Chancellor to Queen Elizabeth, to whom that queen had granted to be admiral of Corfe Castle and the Isle of Purbeck, successfully claimed certain casks which had been washed ashore on his land; but others which were found floating and not touching the ground within three miles from the shore went to the Crown as droits of Admiralty. Sir John Nicholl in that case intimates an opinion that the Crown had not

the power to grant such jurisdiction on the high seas, *i.e.* below low-water mark, to any subject.

Except in this sense, the name is now only applied to officers holding the highest rank in the Royal Navy. Admirals have various grades of rank, viz., admirals of the fleet, admirals, vice-admirals, and rear-admirals, the numbers of each rank being fixed by Admiralty regulations, made under Orders in Council. They are flag-officers, *i.e.* officers commanding squadrons of ships, and were formerly distinguished by belonging to the White, Blue, and Red squadrons of the Fleet respectively. The Red squadron, which had not existed for a century before 1806, was then revived in commemoration of the victory of Trafalgar. These divisions were abolished in 1864, and the distinguishing flags of these officers are now—for an admiral of the fleet, the Union Jack at the mainmast head; while admirals, vice-admirals, and rear-admirals hoist a white flag with a red St. George's Cross at the mainmast, foremast, and mizzenmast head respectively; and if the ship be one-masted, in the case of a vice-admiral one red ball is added in the upper left quarter of the flag, and two red balls in the case of a rear-admiral.

Their combatant powers, duties, and liabilities are defined in the Naval Discipline Act of 1866, 29 & 30 Vict. c. 109, and the Admiralty Regulations. Among them is the power of authorising the arrest of offenders against that Act, by warrant under their hand (s. 50); and it seems that an order to arrest without a warrant is sufficient generally (*R.* v. *Cuming*, 1887, 19 Q. B. D. 13). Civilly, like all other naval officers, they are exempt from serving as jurymen or churchwardens (Jury Act, 1870, s. 9 and sched.; Prideaux, *Churchwardens' Guide*, p. 12). See Navy.

[Comyn's *Digest*, "Admiral;" *Encyclopædia Britannica*, tit. "Admiral," 9th ed., 1889, and Supplement, 1902, vol. xxv. "Admiralty."]

Admiralty Action.—Every action may be said to be an Admiralty action which is maintainable in the Admiralty Division, whether it was, before the Judicature Act, 1873, peculiar to the Admiralty Court, or triable concurrently there and in the Common Law and Chancery Courts. The former kind of actions are now expressly assigned to the Admiralty Division (Judicature Act, 1873, s. 35); the latter, though assignable to any Division of the High Court (S. C. R., 1883, Order 5, r. 5), are in practice, where advantage can be taken of the process *in rem*, which is only available in the Admiralty, generally assigned or tried there. The Admiralty Court formerly exercised jurisdiction by two kinds of process—one *in personam*, the other *in rem*. By the former, the person of the defendant was arrested and detained till he gave security to answer the claim; by the latter, the property which had given rise to the cause of action could be arrested and made liable to satisfy the plaintiff. In early times, the former was the regular method, the latter being only resorted to when the person of the defendant could not be attached; but the former has now become obsolete, the last instance of its exercise being said to have been in 1780 (*The Clara*, 1855, Swa. Ad. 1). The process *in rem* since that time has been the distinctive Admiralty process, in all cases where a *res* or property at sea was concerned, and it has accompanied all the additions made to Admiralty jurisdiction. The process *in rem* is not available against proceeds of a *res* in the hands of a private

person who has sold the *res* (*The Optima*, 1905, 74 L. J. P. 94). But the Admiralty Court also had an inherent power to exercise jurisdiction *in personam* in the ordinary way, and could make use of it in all cases where an action *in rem* would have been available, if the *res* had not been inaccessible to the process (*e.g.* vessel sinking which had caused a collision), except in the case of bottomry (and wages before power was given by Admiralty Act, 1861), and also in certain cases of injury done to person or property, by persons on the high seas; what those persons were it is not clearly settled, except that certainly they did not include pilots, nor perhaps masters of ships. "The Court of Admiralty exercised jurisdiction *in personam*, wherever there was a proceeding *in rem*, but then it limited the damages recoverable to the value of the *res*. It exercised a personal jurisdiction in the nature of a disciplinary authority, as for assault by officers of ships on the high seas, where there was no jurisdiction *in rem*. But this, as in *The Ruckers*, was done with hesitation when the plaintiff was not one of the ship's company, but only a passenger, though the proceeding was against the master" (Kay, L.J., *R.* v. *City of London Court Judge*, [1892] 1 Q. B. 273; and see Lord Herschell, *The Zeta*, [1893] App. Cas. 468; *The Heinrich Bjorn*, 1886, 11 App. Cas. 270). Whenever new jurisdiction was given to the Court by statute, it was made exercisable both *in rem* and *in personam* (Admiralty Act, 1861, s. 38). There is no jurisdiction *in rem* under Lord Campbell's Act for loss of life (*The Vera Cruz*, 1884, 10 App. Cas. 59; Williams and Bruce, 3rd ed., 77); and an application to transfer an action *in personam* under this Act, for loss of life owing to the negligent navigation of a railway company's steamer, from the King's Bench Division to the Admiralty Division has been refused (*Roche* v. *L. S. W. R.*, [1899] 2 Q. B. 502). For the nature of Admiralty actions, see *Currie* v. *M'Knight*, [1897] A. C. 97.

The following causes were within the exclusive jurisdiction of the Court:—*Salvage* both on the high seas and within the body of an English county (Admiralty Act, 1840, s. 6); *life salvage* of persons on board British ships in any waters, and foreign ships in British waters, or anywhere with the consent of their Governments (M. S. A., 1854, s. 458; and 1862, s. 59; and Admiralty Act, 1861, s. 9, now consolidated in M. S. A., 1894, s. 544); *bottomry; necessaries* supplied to foreign ships, or ships owned by persons not domiciled in England or Wales (Admiralty Court Acts, 1840 and 1861); *possession of ships*. It has also been said that any action *in rem* could be brought in the Admiralty Court upon a foreign judgment *in rem*, in order to enforce it in England (*The City of Mecca*, 1879, 5 P. D. 28; Sir R. Phillimore in the Court of Appeal (6 P. D. 106)); Baggallay, L.J., seems to doubt this, Jessel, M.R., to support it. The following actions belonged to the Admiralty concurrent jurisdiction:—*Collision or damage*, both to property and persons, by ships (Admiralty Act, 1861, s. 7; *The Theta*, [1894] Prob. 280), whether on the high seas or in the body of an English county (Admiralty Court Act, 1840, s. 6), and in foreign waters, even in inland waters, whether the ships are foreign or British (*The Diana and The Courier*, 1863, Lush. 593 and 541); damage to ships caused by persons on board other ships, *e.g.* officer in charge of a Queen's ship (*The Swallow*, 1856, Swa. Ad. 30); and injury by persons to persons (see above, *The Ruckers*, 1801, 4 Rob. C. 73); *damage to cargo* carried in any foreign ship to a port in England or Wales (Admiralty Court Act, 1861, s. 6); *towage* on the

high seas and within a county (Admiralty Act, 1840, s. 6); *wages and pilotage*, earned by masters, seamen, and any persons employed on board a ship, whether British or foreign, in the latter case with the consent of the ship's consul, under any kind of contract, and *disbursements* by master on account of the ship (M. S. A., 1854, s. 191; and Admiralty Court Act, 1861, s. 10; now re-enacted in M. S. A., 1894, ss. 155-167, and 742); *mortgage*, in actions by mortgagees of a ship, if she is under process of the Court (Admiralty Court Act, 1840, s. 3), or if the mortgage is registered under the Merchant Shipping Acts (Admiralty Court Act, 1861, s. 11); questions as to the *title, ownership, and management* of ships. Besides these there is also the action for limitation of liability, by which shipowners can limit their liability for loss done without their actual fault or privity by their ships to other ships, to £15 per ton, in case of loss of life, and £8 per ton otherwise; jurisdiction in such actions was at first given exclusively to the Chancery Court (M. S. A., 1854, s. 514), but the Admiralty Court obtained concurrent jurisdiction over them in 1861, in cases where the ship was under process of the Court; and since 1873 the Division has the same powers as the Chancery Court had before.

The Admiralty jurisdiction of the County Courts is perhaps the best illustration of what is meant by Admiralty actions. All of them have a common-law jurisdiction limited to claims of £100 (County Courts Acts, 1888 and 1903); those of them which are given Admiralty jurisdiction can try the following causes up to a much higher limit, namely, *salvage*, where the value of the salved property does not exceed £1000, or the claim for reward £300; *towage, necessaries, and wages*, actions where the claim does not exceed £150; claims for *damage to cargo* or by *collision* (*q.v.*), up to £300; and in any of the above actions beyond the statutory limit if the parties so agree (County Courts Admiralty Act, 1868, s. 3). This Act has been declared to mean that the County Courts thereby enjoy the same jurisdiction as the Admiralty Court possessed at the time when the Act passed (*R.* v. *Judge of City of London Court*, [1892] 1 Q. B. 272). Another Act, that of 1869, adds to the preceding one a jurisdiction over claims arising out of breaches of charter-parties, and other contracts for carriage of goods in foreign ships, or torts in respect thereof (s. 2). This Act gives the County Courts a jurisdiction which is not limited by that which the Admiralty Court had at the time of the Act being passed (*The Cargo ex Argos*, 1873, L. R. 5 P. C. 134; *The Aline*, 1880, 5 Ex. D. 227). This jurisdiction is not affected by the general County Courts Acts, which are to be read as one with the special Acts.

The process *in rem* is described under ARREST OF SHIP; that *in personam* is the same as the ordinary action in the other Divisions of the High Court. See ACTIONS AND MATTERS IN THE HIGH COURT. The procedure in Admiralty actions is governed by numerous orders and rules of the Supreme Court (see Williams and Bruce, part ii.; *The Assunta*, [1902] P. 150; endorsement of writ, *The Chiltonford*, [1901] W. N. 48, 17 T. L. R. 293; *The Skudanaes*, 1901, 17 T. L. R. 649; *The Swiftsure*, 1900, 9 Asp. 65; *The Madeleine*, 73 L. J. P. 24, 9 Asp. 508, plaintiff in action *in personam* can obtain judgment by default). No new trials are had in Admiralty (Williams and Bruce, 3rd ed., 449, 551, 552), but the Court can rehear causes (*The Georg*, [1894] P. 330). It can also, it would seem, order an action to be tried with

a jury (*ibid.* 442). Agreements in writing between solicitors in Admiralty actions may be made orders of Court subject to approval of the Admiralty Registrar (Order 52, r. 23; Williams and Bruce, 509; *The Gemma*, [1899] P. 285). For examples of service of writs on proper officers of foreign corporations carrying on business here, see *The Princess Clementine*, [1897] P. 18; *The Bourgogne*, [1899] P. 1; [1900] A. C. 431. Of service out of the jurisdiction in collision, *The Duc d'Aumale*, [1903] P. 18. A claim to share in a salvage award is a common-law action only, and cannot be brought on the Admiralty side of a County Court (*The Gloxinia*, 1902, 18 T. L. R. 227). An action *in rem* will lie for damage done by a ship in navigation to an oyster bed (*The Swift*, [1901] P. 168); and for expenses incurred and loss suffered by a ship in order to avoid collision with another ship (*The Port Victoria*, [1902] P. 25).

For the various actions considered in detail, see BOTTOMRY; COLLISIONS AT SEA; DAMAGE (ADMIRALTY); CARGO; MORTGAGE; NECESSARIES; PILOTAGE; POSSESSION; SALVAGE; TOWAGE; WAGES.

[Williams and Bruce, *Admiralty Practice*, 3rd ed.; Roscoe, *Admiralty Practice*.]

Admiralty Advocate.—See ADVOCATE, KING'S.

Admiralty Division.—This is a Division of the High Court consisting of two judges (who also hear Probate and Divorce causes), which exercises all the jurisdiction formerly possessed by the High Court of Admiralty (Judicature Acts, 1873, ss. 16, 22, 31, 36, and 1875, s. 11) as well as that directly given to itself. An account of its position thus involves a description of the powers of the Admiralty Court, which it succeeded. It is beyond the limits of this article to enter even cursorily on the history of that Court (which will be found in Williams and Bruce, *Introduction*, and in the arguments and decisions in *R.* v. *Judge of City of London Court*, [1891] 1 Q. B. 273, and *The Zeta*, [1893] App. Cas. 468), beyond saying that it was a Court of great antiquity—the Admiral and Court of Admiralty have been time out of mind, and so it was said in the time of Richard I. (Co. Lit., quoted by Com. *Dig.* "Adm.")—in which the Lord High Admiral or his lieutenant exercised civil and criminal jurisdiction over matters and offences arising on the high seas, certainly from the time of Edward III. It was a Court of limited jurisdiction, liable to prohibition by the Courts of common law, which, by statutes and prohibitions, strictly confined its jurisdiction to matters on the high seas (13 Rich. II.; 15 Rich. II. 3; 2 Hen. IV. 11) until 1861, when it was made a Court of Record. See COURT OF RECORD. Its jurisdiction was original and statutory, the latter being given to it mainly by enactments of the present reign. It was on the one hand an Instance Court, exercising civil and criminal jurisdiction, and on the other a Prize Court. Its prize jurisdiction has been said not to be inherent, but to have been granted to it by special commission from time to time, and not to go back further than the middle of the seventeenth century (*Lindo* v. *Rodney*, 1782, Doug. 613, Lord Mansfield); but the accuracy of this statement is qualified by the fact, which recent examination of the early Admiralty records has shown, that, although distinct prize sittings of the Court did not begin till that time, its jurisdiction in prize or piracy or "spoil" cases was probably

the earliest which it exercised at all, and from the recorded instances, going back to the fourteenth century, it would seem that the institution of the Court was due to the prevalence of the disputes thus arising between English and foreign subjects (R. G. Marsden, *Select Pleas of the Court of Admiralty*, Selden Society, 1892 and 1897). It was made part of its regular jurisdiction by the Naval Prize Act of 1864.

The criminal jurisdiction of the Instance Court extended over all offences committed on the high seas, not triable by the Common Law Courts, viz., murder, treason, piracy and felony on the high seas, and murder, mayhem in great ships hovering in the main stream of great rivers beneath the bridge of such rivers nigh the sea (15 Rich. II. 3); and by 28 Henry VIII. c. 25, a special commission was established to exercise this jurisdiction, consisting of the admiral and his deputy and others, usually common-law judges, according to the law of the land. But in 1835, when the Central Criminal Court (*q.v.*) was established, this jurisdiction was transferred to it, the judge of the Admiralty being made a member of that tribunal; and in 1844 all offences committed within the jurisdiction of the Admiralty were made triable in the county where the offender was in custody, as if they had been committed in that county. The Admiralty Court, till 1866, had also authority to administer discipline in the Royal Navy, but this is now performed by naval courts-martial.

The civil jurisdiction inherent in the Instance Court seems to have been restricted to torts to property, and in some cases to persons, and salvage on the high seas, suits for possession of ships where no claim of title was raised, hypothecation or bottomry of ships' freights and cargoes, seamen's wages not earned under a special contract, restitution of goods piratically seized on the high seas, and forfeiture of the goods of pirates as droits of Admiralty. The law which it administered was the general maritime law, as adopted by itself from maritime customs and laws common to all nations, and codes of sea law such as the Laws of Oleron (composed by our Richard I.) and the Consulate of the Sea. "The law which is administered in the Admiralty Court of England is the English maritime law. It is not the municipal law of the country, but it is the law which the English Court of Admiralty, either by Act of Parliament or by reiterated decisions and traditions and principles, had adopted as the English maritime law. This is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him and Dr. Lushington after him), and I do not understand that the present learned judge of the Admiralty Court (Sir Robert Phillimore) differs in the least from them" (Brett, L.J., in *The Gaetano* v. *Maria*, 1882, 7 P. D. 143). "Neither the laws of the Rhodians nor of Oleron nor of Wisby nor of the Hanse Towns are of themselves any part of the law of England. . . . But they contain many valuable principles and statements of marine practice, which, together with principles found in the *Digest*, and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding, and reducing to form, the principles and practice of their Court" (Lord Esher, M.R., *Gas Float Whitton, No.* 2, [1896] Prob. 47).

The following jurisdiction was given to the Court by modern statutes: power to decide the title to or ownership of any ship or its proceeds, and claims for salvage, damage, towage, and necessaries supplied to a foreign ship within the body of a county as upon the high seas

(Adm. Act, 1840, s. 6); and power to try questions of booty of war (*i.e.* land prize), whenever such shall be referred to it by the Crown (*ibid.* s. 22; see BOOTY OF WAR); over claims by material-men (*e.g.* builders) against a ship under arrest of the Court; necessaries supplied to any ship elsewhere than in ports to which she belongs if no part owner of her reside in England or Wales; damage done by any ship; damage to cargo carried in a foreign ship into any port in England or Wales; questions of co-ownership; life salvage from a British ship anywhere, or from a foreign ship in British waters and elsewhere with the consent of its Government (now re-enacted in M. S. A., 1894, ss. 544 and 545); wages and disbursements of masters of ships (Adm. Act, 1861, ss. 9-10). It also was given power to decide claims by Queen's ships for captures from pirates, and to condemn all such captured property as droits of Admiralty, subject to the owner's right to recover it on paying one-eighth of its value as salvage (1850, 13 & 14 Vict. c. 26, s. 2). It was made a regular Prize Court, with power to decide questions of ransom and petitions of right in prize cases, to punish disobedience of convoyed ships to the man-of-war in charge of them, and award damages to convoyed ships exposed to danger by the officer in charge of the convoy (Prize Act, 1864, ss. 1, 2, 45, 46; Naval Discipline Act, 1866, s. 30; see PRIZE). It had jurisdiction to decide questions of seizure of ships under the Foreign Enlistment Act, 1870, s. 19 (see FOREIGN ENLISTMENT); to punish merchant ships for carrying improper colours, or assuming a nationality which they did not possess, and to remove masters of ships, on the application of persons interested in them (now given to the High Court by M. S. A., 1894, ss. 73 and 472). By the Admiralty County Courts Act, 1868, it was made the Court of Appeal from County Courts in Admiralty causes. Appeals lay to it from the Cinque Ports Salvage Commissioners as well as to the Cinque Ports Admiralty Court (1 & 2 Geo. IV. c. 76, s. 4), though it is believed that none yet have been brought; as also from the Liverpool Court of Passage and the City of London Court on their Admiralty side (Williams and Bruce, 513, 517, 518).

Since the Court has been merged in the Division, the latter has received jurisdiction in cases under the Slave Trade Act, 1874; and the Pacific Islands Kidnapping Act, 1875. The prize jurisdiction of the Admiralty Court, now exercised by the High Court of Justice, is assigned to the Admiralty Division (Judicature Act, 1891, 54 & 55 Vict. c. 93, s. 4), as is also the jurisdiction of the High Court under the Mail Ships Acts, 1891 and 1902; and the Admiralty Registrar exercises the jurisdiction of the High Court in the cases of application by shipowners to recover the excess of wages paid to seamen whom they have had to substitute for seamen volunteering into the Navy (M. S. A., 1894, s. 197; R. S. C. (M. S.), 1894, s. 2). It generally exercises the powers of the High Court under the Merchant Shipping Act, 1894, *e.g.* in proceedings for limitation of shipowners' liability (with the extensions made by the M. S. A., 1898 and 1900), and appeals from decisions of Courts of summary jurisdiction, naval Courts, or a wreck commissioner, or a stipendiary magistrate, in inquiries into maritime casualties (M. S. A., 1894, s. 475); from Colonial Courts of Inquiry into maritime casualties (*ibid.* s. 478); and from summary decisions of County Courts in salvage causes (*ibid.* s. 549). It can prohibit a County Court having Admiralty jurisdiction (*The Recepta*, [1893] P. 255; *The Ruby*, [1898] P. 59); issue *mandamus* and injunction, and appoint a receiver (*The Ampthill*, [1880]

5 P. D. 224), and have transfers made to it of Admiralty causes from County Courts (31 & 32 Vict. c. 71, ss. 6-8, 23, 32; Williams and Bruce, 3rd ed., 397-402). In practice, the judges of the Admiralty Division do not exercise criminal jurisdiction, though as judges of the High Court they can do so; and in *R.* v. *Keyn*, 1876, 2 Ex. D. 63, a case which led to the passing of the Territorial Waters Act, 1878, extending the criminal jurisdiction of the admiral over all offences committed within three miles of the English coast, Sir Robert Phillimore, then judge of the Admiralty Division, sat as a member of the Court for Crown Cases Reserved. (Williams and Bruce, *Admiralty Practice*, 3rd ed.; Roscoe, *Admiralty Practice, Introduction.*)

Admiralty, Droits of.—See ADMIRALTY, THE; DECLARATION OF WAR; ENEMY'S GOODS.

Admiralty, The.—In any Act of Parliament the expression "the Admiralty" means the Lord High Admiral of the United Kingdom, for the time being, or the commissioners for the time being for executing that office (Interpretation Act, 1889, s. 12 (4)). The Admiralty Office is the State Department which exercises the administrative powers of the Lord High Admiral (see ADMIRAL), by means of commissioners appointed by the Crown for that purpose, and known as the Lords Commissioners of the Admiralty. The office of Lord High Admiral was first put in commission in 1632; during the Commonwealth it was administered by a committee of Parliament; in 1690, under William and Mary, it was again put in commission, and, with a few short intervals, when a Lord High Admiral was appointed, it has so remained ever since. The commissioners consist of the First Lord, whose position is equal to that of a principal Secretary of State, and who is responsible to the Crown and to Parliament for the Department; four Naval Lords (naval officers), of whom the senior ones are responsible for the *personnel* of the Navy, and the third, the comptroller, is responsible for its material; and a Civil Lord. The Admiralty Board comprises the commissioners, and also a Financial and a Parliamentary Secretary (Anson, *Law of Constitution*, "Crown," 86, 393). The Board administers and controls the affairs of the Royal Navy, and by the Army Act, 1881 (s. 179), those of the Royal Marines. In this capacity it grants all commissions held by officers in the Navy and Marines; its leave is necessary before any commission can be resigned (*R.* v. *Cuming*, 1887, 19 Q. B. D. 13; *Hearson* v. *Churchill*, [1891] 2 Q. B. 144); and its consent is requisite before any salvage reward is allowed to be claimed by any of the King's ships for services rendered to other vessels (M. S. A., 1894, s. 557; for form of consent, see *The Cargo ex Woosung*, 1876, 1 P. D. 262). Although there is no jurisdiction to issue process against the Lords of the Admiralty personally, in cases of damage or salvage, or the like, where the King's ships are concerned, the Admiralty generally appear to defend the action when brought against the officer in charge. It may bring actions in its own name to protect its public property, such as naval stores and equipments, and its rights in contract and tort (1868, 31 & 32 Vict. c. 78); it may acquire land for public purposes either by agreement or compulsorily (1864, 27 & 28 Vict. c. 57; 1865, 28 & 29 Vict. c. 124); for coastguard service (1856, 19 & 20 Vict. c. 83); it has general rights and powers over dockyards (1865, 28 & 29

Vict. c. 125); it administers Greenwich Hospital (28 & 29 Vict. c. 89), to which it is empowered to hand over any undisposed-of residue of officers', sailors', or marines' effects, after the lapse of a certain time from their deaths (28 & 29 Vict. c. 111, and (1889) 52 & 53 Vict. c. 42, s. 30); and (in common with other authorities) it is given certain administrative powers with regard to the use of wireless telegraphy apparatus on board British ships and foreign ships in British territorial waters (Wireless Telegraphy Act, 1904, 4 Ed. VII. 24).

One branch of the Lord High Admiral's original administrative powers, viz., the droits or perquisites of Admiralty, has been reserved to the Crown since 1702, when Prince George of Denmark, then Lord High Admiral, surrendered all the rights, profits, perquisites, and advantages belonging to the office, in consideration of a fixed yearly sum of £7000 a year (which, by an Act of George II., was divided among the Commissioners). To quote Sir J. Nicholl: "To the office of Lord High Admiral certain perquisites belonged from time immemorial, and it is to the king in his office of Admiralty that these droits now belong, unless, by authority of Parliament, they are otherwise applied" (*R.* v. *Forty-nine Casks of Brandy*, 1836, 3 Hag. Adm. 257). By a statute of the first year of the Queen's reign, these droits, as part of the Crown hereditary revenues, go to the Consolidated Fund (1 & 2 Vict. c. 2, s. 7), as they did under William IV. *Droits of Admiralty* comprehend all ships, boats, or cargoes derelict on the high seas, flotsam, jetsam, and lagan, treasure, deodands, and wrecks, not granted by the Crown to subjects, *e.g.* lords of manors; of all these the Lord High Admiral had the custody, and if no owner appeared to claim them within a year and a day, the Court of Admiralty condemned them as his property. This jurisdiction still exists, and is vested in the Admiralty Division; but where such property is found within the tidal waters of the United Kingdom, it is dealt with under the provisions of the Merchant Shipping Act, 1894, ss. 510-529; and if unclaimed in a year, is forfeited to the Crown. The Act, however, only applies to British tidal waters; and derelicts, etc., found on the high seas, do not seem to be affected by it. They belong to the Crown, subject to rewarding the salvors, for which power is reserved by 1 & 2 Vict. c. 2, s. 12 (*The Aquila*, 1798, 1 Rob. C. 43; *R.* v. *Derelicts*, 1825, 1 Hag. Adm. 383; *The Dantzic Packet*, 1837, 3 Hag. Adm. 385), after suit in the Admiralty Division. Admiralty droits also include all royal fishes, such as whales, sturgeons, porpoises (Sir L. Jenkins' Life, i. 89 and 98); all ships or goods of the enemy taken without commission from the Admiralty (1864, Prize Act, s. 39), or found in "ports, creeks, or roads in the British dominions, unless they come in voluntarily upon revolt, or are driven in by the king's cruisers," *i.e.* if they do so by accident or ignorance (Order in Council of 1655; *The Rebekah*, 1799, 1 Rob. C. 227; *The Maria Française*, 1806, 6 Rob. C. 297; *Raft of Russian Timber*, 1859, 5 Jur. N. S. 1109); all goods taken from pirates, and belonging to them after they have been convicted of piracy (*The Panda*, 1842, 1 Rob. W. 423); but a sale of piratical property to an innocent purchaser has been held to prevent the forfeiture attaching (*The Telegrafo*, 1871, L. R. 3 P. C. 673). All property recaptured from pirates by ships of the Royal Navy pays one-eighth of its value as salvage to the captors, and the residue, if unclaimed by the owners, becomes a droit of Admiralty (1850, 13 & 14 Vict. c. 26, s. 5). There is an important difference between the Crown's rights, *jure coronæ*, and those in its

office of Admiralty as regards captures of enemy's ships. The property in prizes belongs to the Crown, though in practice it abandons its rights in favour of the captors (Prize Act, 1864, s. 55); but the captors must have a commission from the Admiralty, or the captured property is a droit of Admiralty. Thus it was held that if soldiers from the land take a ship which is at sea, that is a droit of Admiralty; and that, if an uncommissioned ship assist a commissioned ship in taking a prize, the latter will only get half of the value, and the other half is an Admiralty droit (*The Rebekah, supra*). The Admiralty may buy, without condemnation, goods on board a foreign ship, taken while carrying them to the enemy (Prize Act, 1864, s. 38).

All civil droits of Admiralty now vest in the Board of Trade (17 & 18 Vict. c. 20, s. 10, 1854), and are dealt with by them according to the provisions of the Merchant Shipping Act, 1894, where they are found within British jurisdiction, and beyond that limit (three miles from the shore), at their discretion. When sold, droits of Admiralty are subject to the same duties as if they had been regularly imported (39 & 40 Vict. c. 35, s. 1, sched.); and all wreck (which expression includes jetsam, flotsam, lagan, and derelict) brought or coming into the United Kingdom or Isle of Man, if foreign goods, pay the same duty as if they had been imported (M. S. A., 1894, s. 569). The institution of Colonial Courts of Admiralty does not alter the right of the Crown to the droits of Admiralty or droits of forfeitures to the Crown in any British possession; but the Crown may direct that any such droits and forfeitures shall form part of the revenues of possession, either for ever or for a fixed time (Colonial Courts of Admiralty Act, 1890, s. 27).

Admission in Criminal Cases.—An admission in a criminal case is any statement made by an accused person of his guilt, or of any fact or circumstance tending to prove it; or any assent to any statement made in his presence and hearing, relative to any fact within his knowledge. The general rules as to putting admissions in evidence apply to criminal as well as to civil cases; but in the interests of justice, and for the protection of accused persons, Courts of criminal jurisdiction are somewhat stricter as to the admissibility of confessions of guilt not made in open Court, or of admissions made out of Court tending to establish guilt, and the rule laid down is as follows: To be admissible in evidence against the person making it, such admission must be proved by the prosecutor to have been made freely and voluntarily, and not to have been preceded by any threat or inducement by any person in authority (*R.* v. *Thompson*, [1893] 2 Q. B. 12; *R.* v. *Brown*, 1903, 68 J. P. 15, Wills, J.); and it is not permissible to put in evidence, to prove an admission by the accused, the fact that he did not contradict a statement made in his presence, unless the circumstances show that he had full opportunity of contradiction, and might reasonably be expected to answer (*R.* v. *Smith*, 1897, 18 Cox C. C. 470). There is some divergence of judicial opinion as to the admissibility of answers to questions put by the police without caution to persons then in custody or subsequently arrested (*R.* v. *Brackenbury*, 1893, 17 Cox C. C. 618, and note; *R.* v. *Morgan*, 1900, 67 L. J. Q. B. 526; *Rogers* v. *Hawken*, 1900, 67 L. J. Q. B. 528). See CONFESSION.

Admission of Solicitor.—See SOLICITOR.

Admissions may for convenience be divided into (A) direct admissions, made for the purposes of an action under the rules of practice; and (B) relevant admissions, constituting, with the DECLARATIONS (of dead persons) and the CONFESSIONS (of prisoners), exceptions to the rule which excludes from proof statements not made upon oath by a witness in the action as being hearsay.

Note.—In the following article, T. means Taylor on *Evidence*, 10th ed., 1906; R. N. P., Roscoe's *Nisi Prius Evidence*, 17th ed., 1900; and S., Stephen's *Digest of Evidence*, 6th ed., 1904.

(A) DIRECT ADMISSIONS.—1. *By Pleadings.*—Every allegation of fact in any pleading, not being a petition or summons, if not denied, or stated to be not admitted in the pleading of the opposite party, is taken to be admitted, except as against infants or persons of unsound mind (Order 19, r. 13). An evasive denial, not denying the substance of an allegation, may in effect admit it, wholly or in part (Order 19, r. 19). But damages and their amount are taken to be denied unless expressly admitted (Order 21, r. 4). And if the plaintiff does not deliver a reply, all material statements of fact in the pleading last delivered are taken to be denied and put in issue (Order 27, r. 13). [See also Order 23, r. 1, which forbids a reply without leave.]

2. *By Payment into Court.*—If money is paid into Court under Order 22 without denial of liability, the defendant is taken to admit the claim or cause of action in respect of which the payment is made (r. 1); but such payment does not, apparently, conclusively admit that the whole of the sum paid in is due (*Gray* v. *Bartholomew*, [1895] 1 Q. B. 209; *The Mona*, [1894] P. 265), as does payment in an action for libel under Lord Campbell's Act (*q.v.; Dunn* v. *Devon Newspaper Co.*, [1895] 1 Q. B. 211*n.*). The admission is no more than that something, not exceeding the sum paid in, is due, not that something is due upon each item of an account (*Hennell* v. *Davies*, [1893] 1 Q. B. 367). See further, PAYMENT INTO COURT.

3. *Upon Notice.*—A party may, by notice in the specified form, call upon the opposite party to admit any document, saving all just exceptions, under penalty of the costs of proof, in any event, unless the judge certify that the refusal to admit was reasonable. And no costs of proving any document will in general be allowed unless such notice has been given (Order 32, r. 2; T. s. 724 A, B). A party may also, by notice in writing in the specified form, at any time not later than nine days before the day for which notice of trial is given, call upon the opposite party to admit specific facts for the purposes of the action only, under the like penalty, and such admission of facts cannot be used for the purposes of any other action, or in favour of any party other than the party giving the notice. It may be withdrawn or amended by leave of the judge (Order 32, r. 4). An admission of documents or facts under the order may be proved by an affidavit of the plaintiff's solicitor or of his clerk (r. 7).

4. *By Order.*—Upon a summons for directions under Order 30, r. 7, the judge may order the defendant to admit matters not really in dispute for the purposes of the action, and such orders have been frequently made in commercial causes (see Mathew's *Com. Cas.* vol. i., Introduction, 9).

5. *By Answers to Interrogatories.*—See INTERROGATORIES, and *infra*, (B (2) and B (5)).

6. *Judgment on Admissions.*—The plaintiff may at any stage, where admissions of fact have been made, apply for such judgment as he is then entitled to thereon, and the judge may make such order as he thinks just (Order 32, r. 6). The application is usually made by motion (*Cook* v. *Heynes*, 1884, W. N. 75).

(B) RELEVANT ADMISSIONS.—1. *Definition; Proof.*—A statement, whether oral or written, although not made upon oath as evidence for the purposes of the action, and any act or omission, which suggests an inference as to any fact in issue, and is made or done or omitted by a party, or by someone who can make admissions on his behalf, may be given in evidence against that party. For example, an attempt to suborn false evidence may be proved, because it suggests that the person who made it knew he had a fraudulent case (*Moriarty* v. *L. C. & D. Rwy. Co.*, 1870, L. R. 5 Q. B. 314). A copy of a document supplied by a party to his opponent is evidence against him of the contents of the document (*Stowe* v. *Querner*, 1870, L. R. 5 Ex. 155); an offer, if not without prejudice (see below (2)), is evidence of some liability (*Wallace* v. *Small*, 1830, Moo. & M. 446). Silence or acquiescence may be evidence of assent to a claim or allegation. See ACQUIESCENCE.

Such statement and conduct, when not made relevant only because of the death of the person who made them (see DECLARATIONS OF DECEASED PERSONS), are in civil cases described generally as "admissions." They are primary evidence (T. ss. 723, 793), and may be proved by the testimony of any witness to them, without calling the person to whom they were addressed (*Woolway* v. *Rowe*, 1834, 1 Ad. & E. 114); so that they are admissible to prove the contents of a document of which secondary evidence could not be given (*Slatterie* v. *Pooley*, 1840, 6 Mee. & W. 664); so also the answers made by a bankrupt upon his examination may be proved by a shorthand writer who took a note of them, although the bankrupt has not signed the transcript (*R.* v. *Erdheim*, [1896] 2 Q. B. 260; *Milward* v. *Forbes*, 1802, 4 Esp. 171).

2. *Exceptions.—Compulsion; Without Prejudice.*—Statements made under constraint cannot, apparently, be given in evidence, if the constraint was illegal—as, for example, if a party is compelled by the Court to answer incriminating questions upon cross-examination (*R.* v. *Garbett*, 1847, 1 Den. Cr. C. 236; *R.* v. *Coote*, 1873, L. R. 4 P. C. 599; *Stockfleth* v. *De Tastet*, 1814, 4 Camp. 10; 15 R. R. 720; T. s. 798); otherwise they can. Thus an answer to interrogatories, although in another action (*Fleet* v. *Perrins*, 1869, L. R. 3 Q. B. 536; 4 Q. B. 500), or evidence upon examination in Court in another cause (*Collett* v. *L. Keith*, 1802, 4 Esp. 212), may be used. [Depositions of witnesses in a previous action are admissions against a party to a subsequent action, provided he has used or adopted them (*Richards* v. *Morgan*, 1863, 4 B. & S. 641; *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241).] Admissions and, in particular, offers, made either expressly "without prejudice" to the issue, or some of the issues, in question (see *In re Daintrey*, [1893] 2 Q. B. 116), or impliedly so, because made only "for peace" (Bull. N. P. 236*b*; T. s. 795; *Paddock* v. *Forrester*, 1842, 3 Man. & G. 903), cannot be given in evidence at the trial, even to influence the judge to give or refuse costs (*Walker* v. *Wilsher*, 1889, 23 Q. B. D. 335), or for any

purpose except to explain delay in taking action (S. C.). A negotiation commenced by a letter "without prejudice" is wholly covered by the protection (*Paddock* v. *Forrester, supra*; *Ex parte Harris*, 1875, 44 L. J. Bk. 33). As to privileged statements to legal advisers, see PRIVILEGED COMMUNICATIONS.

3. *Admissions on behalf.*—The statements and conduct of any party to the action are relevant as admissions whether the party sue for his own benefit or not (R. N. P. 67; S. art. 16); the statement to the contrary, as regards nominal parties, in *Taylor* (T. s. 741) is not supported by the cases cited, which merely show that the Court would summarily set aside a plea founded upon a release fraudulently given by the nominal party (*Johnson* v. *Holdsworth*, 1835, 4 Dowl. 63); or order the release itself to be cancelled (*Payne* v. *Rogers*, 1780, Doug. 407). "What the plaintiff on the record has said is always evidence against him, its weight being more or less. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, still it would be admissible" (*per* Blackburn, J., in *Moriarty* v. *L. C. & D. Rwy. Co.*, 1870, L. R. 5 Q. B. 320). Any party may give notice, by his pleading or otherwise, in writing, that he admits the truth of the whole or any part of the case of any other party (Order 32, r. 1). But statements made by a party suing or being sued in a representative character, in order to be admissible, must have been made while the person was clothed with such character (T. s. 755; R. N. P. 68; *Legge* v. *Edmonds*, 1855, 25 L. J. Ch. 125; see *infra* (4)). So that a statement made by a trustee before his appointment is not evidence (*Fenwick* v. *Thornton*, 1827, Moo. & M. 51; *contra*, *Smith* v. *Morgan*, 1839, 2 Moo. & R. 257). A guardian cannot make admissions on behalf of an infant party (T. s. 755; *Byrne* v. *Byrne*, 1880, 5 L. R. Ir. Ch. 134; *Willis* v. *Willis*, 1889, 38 W. R. 7). Persons who are not parties, but the persons beneficially interested in the subject-matter of the claim, may make admissions which are relevant as against the claimant (T. s. 756; *Welstead* v. *Levy*, 1831, 1 Moo. & R. 138). Thus the statements of a shipowner may be proved against the master who is suing on behalf of the owner (*Smith* v. *Lyon*, 1813, 3 Camp. 465; 14 R. R. 810). But in order to make the admissions of a *cestui-que trust* relevant against the trustee, it must be shown that he is solely interested (*May* v. *Taylor*, 1843, 6 Man. & G. 261; *Doe* v. *Wainwright*, 1838, 8 Ad. & E. 691; R. N. P. 67). Joint contractors, for instance partners, may make admissions on behalf of each other (T. s. 743; R. N. P. 68; *Whitcombe* v. *Whiting*, 1781, 2 Doug. 652) during the continuance of their joint interest (T. s. 751), and their admissions can be given in evidence against any of them who is a party so soon as independent proof of the joint interest has been adduced to the satisfaction of the judge (*Nichols* v. *Dowding*, 1815, 1 Stark. 81; 18 R. R. 746); but mere co-owners may not (*Jaggers* v. *Binnings*, 1815, 1 Stark. 64; 18 R. R. 746); nor co-trustees, where they are not personally liable (*Davies* v. *Ridge*, 1802, 3 Esp. 101; 6 R. R. 817); nor co-executors, unless (but *quære*) in their character as executors (*Fox* v. *Waters*, 1840, 12 Ad. & E. 43; *Scholey* v. *Walton*, 1844, 12 Mee. & W. 510); nor co-defendants in tort (*Daniels* v. *Potter*, 1830, Moo. & M. 501; T. s. 751)—unless the admissions go to prove a common motive (R. N. P. 68; *per* Ellenborough, L.C.J., in *R.* v. *Hardwick*, 1809, 11 East, 585). But admissions by one joint contractor are not available to take the debt out of the Statutes of Limitation as against

another (Lord Tenterden's Act, 9 Geo. IV. c. 14, ss. 1, 2; Mercantile Law Amendment Act, 1856, ss. 13, 14). The admissions of a party's predecessor in title to the interest he claims in the subject-matter, made during the continuance of such predecessor's right, are evidence against the party (T. s. 787-792) [see *Evans* v. *Merthyr Tydfil Urban District Council*, [1899] 1 Ch. 241], because they tend to qualify the title passed (see the judgment of Parke, B., in *Coole* v. *Braham*, 1848, 3 Ex. Rep. 183). Thus the admissions of the assignor, before assignment, are receivable against the assignee (S. C.; *Welstead* v. *Levy*, 1831, 1 Moo. & R. 138); of his testator against the executor (*Smith* v. *Smith*, 1836, 3 Bing. N. C. 29); and of a landlord, before letting, against his tenant (*Crease* v. *Barrett*, 1835, 1 C. M. & R. 919; *Doe* v. *Seaton*, 1834, 2 Ad. & E. 178). The most important class of relevant admissions made on behalf of a party are those made by his agent. The question is always, not whether any relationship of principal and agent exists, but whether the person who actually makes the admission has authority to make admissions in regard to the subject-matter (R. N. P. 69; T. s. 602 *et seq.*); and independent evidence of such authority must be given to the satisfaction of the judge before the admission is relevant. If the authority is express, as if the party has referred to the alleged agent for the information given by him (*Daniel* v. *Pitt*, 1806, 1 Camp. 366*n.*; 10 R. R. 706*n.*; R. N. P. 69; T. s. 760); or if the party has vouched the admission, as by using an affidavit in which it appears in the proceedings (*Brickell* v. *Hulse*, 1837, 7 Ad. & E. 456; T. s. 763)—there is no difficulty. But express authority or ratification is not usually to be looked for, and the authority to make the admission in question is usually inferred from the fact that the party has intrusted the conduct of his affairs in relation to the matter to the person who actually makes the admission, in such manner that the latter can reasonably be deemed to know the truth of the information he gives, and to speak or act on the party's behalf (see *Fairlie* v. *Hastings*, 1803, 10 Ves. 123, and *Langhorn* v. *Allnutt*, 1812, 4 Taun. 511; 13 R. R. 663). A great number of examples are collected in R. N. P. 67-72. A wife, as such, has no authority to make admissions on behalf of her husband, except as regards domestic matters usually left to a wife (*Anon.*, 1722, Stra. 527), or matters given into her care. Thus a wife left in charge of a shop can make admissions as to the payment for goods bought (*Clifford* v. *Burton*, 1823, 1 Bing. 199; 25 R. R. 614), but not as to the terms of tenancy (*Meredith* v. *Footner*, 1843, 11 Mee. & W. 202). A report made by an agent to his principal is not evidence against the principal (*Langhorn* v. *Allnutt*, *supra*; *In re Devala Co.*, 1883, 22 Ch. D. 593). A solicitor has authority, for the purposes of a cause, to make admissions which are not only evidence against his client, but are conclusive against him (T. s. 772; *Young* v. *Wright*, 1807, 1 Camp. 139; *Butler* v. *Knight*, 1867, 2 Ex. Rep. 109); and so has a barrister while engaged in the conduct of the cause (*Stracy* v. *Blake*, 1836, 1 Mee. & W. 168); but a statement in casual conversation by either is not a relevant admission (*Petch* v. *Lyon*, 1846, 9 Q. B. 147).

4. *When made.*—It is a general rule that, where an admission is admissible against a party because it has been made on his behalf by reason of some relation between himself and the person actually making it, it must have been made while the qualifying relation existed (S. art. 16; T. ss. 751, 755, 794; and see as to a nominal party, above (3)).

5. *The whole Admission*, including any statements, entries, or documents incorporated by reference, must be taken and put in evidence together. For instance, the whole of a conversation, so far as relates to the particular matter (*Smith* v. *Blandy*, 1825, Ry. & M. 257), and both sides of an account (*Rose* v. *Savory*, 1835, 2 Bing. N. C. 145); but not unconnected statements (*Prince* v. *Samo*, 1838, 7 Ad. & E. 627), or distinct entries in a book (*Catt* v. *Howard*, 1820, 3 Stark. N. P. 3; 23 R. R. 751), or unconnected letters in a correspondence (*Sturge* v. *Buchanan*, 1839, 10 Ad. & E. 598). An answer or part of an answer to any interrogatory may be used alone against the deponent, unless the judge is of opinion that any other answers are so connected with the answer, or part, in question, that they ought to be put in with it (Order 31, r. 24; *Lyell* v. *Kennedy*, 1884, 27 Ch. D. 1).

6. *Conclusive Admissions.*—The question of relevancy is often confused with that of the weight and effect of the evidence when adduced. In general, admissions are not conclusive of the truth of the matters stated. They may be shown to have been due to mistake (*Lee* v. *Lancashire and Yorkshire Rwy. Co.*, 1871, L. R. 6 Ch. 527—a receipt in full discharge. See also ACCORD AND SATISFACTION); or to be untrue, even though made upon oath by the party himself (*Thornes* v. *White*, 1835, Tyrw. & G. 101; T. s. 857). On principle, it would seem that a party can only be barred from setting up the actual truth by an ESTOPPEL (*q.v.*), as by a receipt under seal, or by a contractual warranty of the truth of the statement sought to be contradicted. The necessities of practice, however, require that admissions made for the purposes of a cause, as by the pleadings (R. N. P. 78), in answer to notice to admit, by payment into Court (*supra*, A (2)), or by counsel or solicitors in the conduct of the cause (*supra*, B (3)), should be conclusive so long as they stand, but the Court or judge has a general power to amend defects or errors in the conduct of proceedings (Order 28; and see r. 12), and may allow any such admission to be withdrawn (*Hollis* v. *Burton*, [1892], 3 Ch. 226; see also Order 32, r. 4).

See ADMISSION IN CRIMINAL CASES.

Admittance to Copyhold.—See COPYHOLD.

Admonition.—See MONITION.

Admortisation.—The alienation of lands or tenements in mortmain. See MORTMAIN.

Adoption.—See CONTRACTS (RATIFICATION); PARTNERSHIP (RATIFICATION).

Adoptive Act.—An Adoptive Act is an Act, the application of which, within certain defined limits, depends on its adoption by some public body, or by a defined number of voters. For instance, under the Public Libraries Act, 1892, on the adoption of the Act by the majority of voters in a library district, the library authority is empowered to provide and maintain public libraries.

The expression, "the Adoptive Acts," is used in the Local Government Act, 1894, s. 7 (1), with reference to certain Acts which the parish meeting has power to adopt. The Adoptive Acts named are: The

Lighting and Watching Act, 1833; the Baths and Washhouses Acts, 1846 to 1899; the Burial Acts, 1852 to 1900; the Public Improvements Act, 1860; the Public Libraries Acts, 1892 to 1901. Other instances of Adoptive Acts are the Infectious Diseases Notification Act, 1889; the Public Health Acts Amendment Act, 1890; the Museums and Gymnasiums Act, 1891; and the Private Street Works Act, 1892. As used in the London Government Act, 1899, the "Adoptive Acts" are the Baths and Washhouses Acts, 1846 to 1896; the Burial Acts, 1852 to 1885; and the Public Libraries Acts, 1892 and 1893.

Adoration of Sacraments.—See COMMUNION.

Ad quod damnum.—A writ which issued to the Sheriff or Escheator of a county before a grant by the king of a liberty franchise or licence relating to property within his bailiwick (*q.v.*). It directed him to inquire whether the proposed grant would be detrimental to the king or others. Formerly no licence to alienate land in mortmain was given until a return *ad damnum nullius* was made. Such an alienation was considered as likely to be detrimental to the country, because it might leave the alienor with insufficient land to qualify him to serve on juries, or to hold onerous offices. The writ fell into disuse chiefly owing to the introduction of the words *Et hoc damus . . . absque aliquo breve ad quod damnum*, and other expressions of the same import, into instruments of grant. It was last used for obtaining licence to change or enclose a highway; but the Act 13 Geo. III. c. 78, s. 19, and subsequent statutes, provided other and more convenient methods of procedure for this purpose. Forms of this writ, which varied considerably, according to the circumstances of the case, are given in *Registrum Omnium Brevium*, ed. 1595, p. 247.

Ad referendum, a term used in diplomatic negotiations where the instructions do not cover a point involved, and meaning that the agent will reply upon it after reference to his government or sovereign.

Ad terminum qui preterit.—A writ of entry for a reversioner when possession had been withheld from him by a tenant for a term of years or for a life or lives, or by any person deriving title under him after the expiration of the term. It might be brought in the *per;* in the *per* and the *cui;* or in the *post.* This writ, which is found on the earliest English Plea Rolls, was abolished by the Real Property Limitation Act, 1833.

Adulteration is the mixing with any substance intended for sale any ingredient which is injurious to health, or which makes the nature or quality of such substance other than that for which it is to be sold or passed (see Bell, Scrivener and Lloyd's *Sale of Food and Drugs Acts*, 4th ed., 1903).

1. The old common-law remedies for adulteration were many and curious (see Hawk., P. C., bk. i. c. 80), but are wholly obsolete. Where, however, food is sold with knowledge that it is dangerous for human food, the seller may be indicted (East, P. C., c. xviii. s. 4, p. 821; *R.* v. *Dixon*, 1814, 3 M. & S. 11; 15 R. R. 381).

2. Where the result of adulteration is to make the description of the adulterated article as that for which it is sold substantially false, the buyer's civil remedies are under sec. 53 of the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71. Where the seller has been subjected to penalties for contravening the Sale of Food and Drugs Acts, he may recover from the person who sold to him the penalties and costs incurred, if the sale to him was a breach of contract, and he bought innocently and resold the article in the state in which he received it (38 & 39 Vict. c. 63, s. 28).

3. Where the discrepancy between the description and the truth is so great as to amount to a deliberately false pretence, the seller is indictable under 24 & 25 Vict. c. 96, s. 88, or for a common-law cheat (*R.* v. *Goss*, 1860, 29 L. J. M. C. 90 (*cheese*); *R.* v. *Foster*, 1877, 2 Q. B. D. 301 (*tea*)). But a mere puffing statement, or even a misrepresentation as to quality, is not indictable (*R.* v. *Bryan*, 1856, 26 L. J. M. C. 84).

Many forms of adulteration are dealt with by statute, in the interests of the public health and revenue, and of fair and honest dealing (see as to these Acts, Parl. Pap., 1896, c. 288).

4. *Food and Drugs generally.*—The Sale of Food and Drugs Acts, 1875, 1879 and 1899, 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 29; 62 & 63 Vict. c. 51, and the Margarine Act, 1887, 50 & 51 Vict. c. 29, form the code in general use for summarily dealing with adulteration of all foods and drinks for man, and of drugs or medicines. The Acts do not interfere with other civil or criminal remedies (38 & 39 Vict. c. 63, s. 28). Prior to the Act of 1899 they only extended to articles used for food or drink by man, other than drugs or water. By sec. 26 of the Act of 1899, the definition of food was extended so as to include "any article which ordinarily enters into or is used in the composition or preparation of human food and flavouring matters and condiments." This definition would include baking powder or yeast, which were not within the Acts of 1875 and 1879 (*James* v. *Jones*, [1894] 1 Q. B. 304).

The Acts of 1875, 1879 and 1899 prohibit—(*a*) Mixing or colouring, staining or powdering with any ingredient or material which will render an article of food injurious to health (38 & 39 Vict. c. 63, s. 3), *e.g.* boiling vegetables with copper (*Friend* v. *Mapp*, 1904, 68 J. P. Rep. 589; *Hall* v. *Horsnell*, 1904, 68 J. P. Rep. 591), or will injure the quality or potency of a drug (s. 4), with intent that the substance should be sold as adulterated; (*b*) Sale of food or drugs so adulterated, unless the seller proves that he did not know, and could not with reasonable care have discovered, the adulteration (ss. 3, 4, 5); (*c*) Sale to the prejudice of the purchaser, even if he buys only for analysis, of any food or drug not of the nature, substance, and quality demanded, whether the difference arises from adulteration or not (38 & 39 Vict. c. 63, s. 6; 42 & 43 Vict. c. 30, s. 2; *Knight* v. *Bowers*, 1885, 14 Q. B. D. 845; *Sandys* v. *Jackson*, 1905, 69 J. P. Rep. 171). Adulteration of spirits with water is within the section only if it exceeds the limit permitted by 42 & 43 Vict. c. 30, s. 6; (*d*) Sale of a compound article of food or compounded drug, not composed of ingredients in accordance with the demand of the purchaser (Act of 1875, s. 7)—this appears mainly to affect chemists making up prescriptions, and offences within it can also be dealt with under (*c*) (*Beardsley* v. *Walton*, [1900] 2 Q. B. 1; *Dickens* v. *Randerson*, [1901] 1 K. B. 437); (*e*) Abstraction from any article of food of any part of it, so as to affect injuriously its quality, substance, or nature, with intent to

sell the article in its altered state, and sale of the article so altered without disclosure of the alteration (s. 9)—this relates especially to milk; as to its effect see *Spiers* v. *Bennett*, [1896] 1 Q. B. 65; (*f*) Wilfully misapplying a warranty or certificate given in respect of a food or drug, other than that to which it is applied (s. 27); (*g*) Wilfully giving a label falsely describing the article sold (s. 27); (*h*) Giving a false warranty in writing by the seller to the purchaser of a food or drug, whether the seller is selling as principal or agent (Act of 1899, s. 20 (6)), unless the seller proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true.

Offences (*a*) (*b*) are punishable, on summary conviction for a first offence, by fine not exceeding £50, and for subsequent offences on indictment for misdemeanor, by imprisonment not exceeding six months with hard labour, 38 & 39 Vict. c. 63, ss. 3, 4). Offences (*c*) (*d*) (*e*) (*f*) and (*g*) are punishable on summary conviction by fine not exceeding £20 (Act of 1875, s. 6). On a second conviction the penalty may be increased to £50, and on any subsequent conviction to £100; or if such subsequent offence was committed by the personal act, default, or culpable negligence of the accused, and the Court considers that a fine will not meet the circumstances of the case, the Court may sentence the offender to imprisonment with or without hard labour for not more than three months (Act of 1899, s. 17). Offence (*h*) is punishable on summary conviction by fine not exceeding £20 for the first offence, not exceeding £50 for the second offence, and not exceeding £100 for any subsequent offence (Act of 1899, s. 20 (6)). Where an article of food or a drug has been bought for test purposes, prosecution in respect of the sale *must* be instituted in the information laid before the expiration of twenty-eight days from the time of purchase (Act of 1899, s. 19 (1); *Beardsley* v. *Giddings*, [1904] 1 K. B. 847; *Brooks* v. *Bagshaw*, [1904] 2 K. B. 798). In other cases, including proceedings for false warranty, the time limit is six months (*Whitaker* v. *Pomfret*, [1902] 1 K. B. 661). The summons must state the particulars of the offence and the name of the prosecutor, and must be returnable not less than fourteen clear days (*M'Queen* v. *Jackson*, [1902] 2 K. B. 163) after the date of service, and there must be served with it a copy of any analyst's certificate obtained on the part of the prosecutor (Act of 1899, s. 19, subs. 2). The accused and his wife are competent witnesses for the defence (*ibid.* s. 21; 61 & 62 Vict. c. 36), and an appeal lies to Quarter Sessions from any summary conviction (s. 23). Penalties recovered in the case of prosecutions by officers of local authorities charged with the execution of the Acts are paid into the common fund of the local authority (s. 26; *R.* v. *Titterton*, [1895] 2 Q. B. 61).

Defences and Excuses.—1. There has been much discussion as to the extent to which guilty knowledge must be proved to establish an offence under the Acts. The result of the decisions would seem to be that guilty knowledge need not be proved, unless the words knowingly, wilfully, or the like appear in the section creating the offence, *e.g.* sec. 5 of the Act of 1875 (*Betts* v. *Armstead*, 1888, 20 Q. B. D. 77; *Pain* v. *Boughtwood*, 1890, 24 Q. B. D. 353; *Dyke* v. *Gower*, [1892] 1 Q. B. 220; *Spiers* v. *Bennett*, [1896] 1 Q. B. 65).

2. Where an employer is prosecuted for an offence under the Acts in respect of a sale by an employé, he is liable to conviction where the

act done by the employé and constituting the offence was unauthorised (*Brown* v. *Foot*, 1892, 61 L. J. M. C. 110; *Parker* v. *Alder*, [1899] 1 Q. B. 20; *Farley* v. *Higginbotham*, 1898, 42 Sol. Jou. 309). These cases appear to be inconsistent with *Kearley* v. *Tonge*, 1891, 60 L. J. M. C. 150.

The following defences and excuses are allowed:—

3. That the article sold was purchased upon an express written warranty that it was of the nature, substance, and quality for which it was resold, and was resold in the same state as it was in when purchased, and that the seller had no reason to believe it to be other than that for which he sold it (38 & 39 Vict. c. 63, s. 25; *Hotchin* v. *Hindmarsh*, [1891] 2 Q. B. 181; *Laidlaw* v. *Wilson*, [1894] 1 Q. B. 74; *Lindsay* v. *Rook*, 1894, 63 L. J. M. 231). The warranty must relate specifically to the bulk from which the adulterated article was taken (*Farmer's Co.* v. *Stevenson*, 1891, 60 L. J. M. C. 70); a specific warranty with each delivery is not essential, and the connection between the warranty and the particular article may be shown by evidence (*Elliott* v. *Pilcher*, [1901] 2 K. B. 817; and see *Wilson* v. *Playle*, 1903, 67 J. P. 263).

This defence seems to be limited to the cases of charges under the Acts of 1875 and 1899, where the offence consists in selling an article not of the nature demanded. It seems not to apply to offences under secs. 3, 4, 5 of the Act of 1875 (*Elliott* v. *Pilcher*, [1901] 2 K. B. 817).

This defence cannot be used unless the person seeking to rely on it has within seven days of service of the summons on him given to the purchaser a copy of the warranty, and a written notice (*Irving* v. *Callow Park Dairy Co., Ltd.*, 1902, 66 J. P. 804) that he intends to rely on it, and specifying the name of the giver of the warranty, and has also sent a like notice to the giver of the warranty (1899, s. 20 (1)). The giver of the warranty is entitled to appear and to give evidence at the hearing (1899, s. 20 (2)). If the giver of the warranty is resident outside the United Kingdom, the defence is not available unless the defendant can prove that he took reasonable steps to ascertain, and did in fact believe in, the accuracy of the statements in the warranty (1899, s. 20 (3)). The defence is open to a servant as well as a master if the servant proves that he had no reason to believe that the article was otherwise than as demanded (1899, s. 20 (4)).

To escape liability for costs, the defendant must before the hearing give notice of his intention to rely on this defence.

4. That the food or drug is unavoidably mixed with extraneous matter in the course of collection or preparation, or contains ingredients not injurious to health, added for its production or preparation as an article of commerce in a state fit for carriage or consumption, and not fraudulently to increase bulk, weight, or measure, or to conceal inferior quality (38 & 39 Vict. c. 63, s. 6, subs. 1).

5. In the case of spirits no penalty is incurred by watering if the result does not make the spirit more than 25 per cent. under proof in case of brandy, whisky, or rum, or than 35 per cent. under proof in the case of gin (1879, s. 6).

6. That the food or drug is a proprietary medicine, or the subject of a patent in force, and is supplied in the state required by the specification of the patent (s. 6, subs. 2).

7. That the food or drug is compounded as in the Act mentioned. The Act does not mention how drugs are to be compounded (*Beardsley* v. *Walton*, [1900] 2 Q. B. 1). In practice reference is made to the British

Pharmacopœia; but it is not the absolute standard (see *White* v. *Bywater*, 1887, 19 Q. B. D. 582; *Boots, Cash Chemists*, v. *Cowling*, 1903, 67 J. P. 195; *Hudson* v. *Bridge*, 1903, 67 J. P. 186).

8. That if compound, and not fraudulently or injuriously mixed, it was sold with a label stating that it is mixed (s. 8; *Jones* v. *Jones*, 1894, 58 J. P. 653), provided that the label is not rendered invisible by the mode in which the article is wrapped up (*Pearks* v. *Houghton*, [1902] 1 K. B. 889). The label must be distinctly and legibly written or printed (1875, s. 8), or so written or printed that the notice of mixture is not obscured by other matter on the label (1899, s. 12). As to margarine labels, see sec. 6 of the Act of 1899. Where an article is proved to be mixed, the burden of proof of any exception or provision in favour of the defence is thrown on the defence (s. 24).

9. The defence may also prove express, clear and specific notice, written or oral, of the quality, etc., of the article without relying on the label defence (*Sandys* v. *Small*, 1878, 3 Q. B. D. 449; *Pearks* v. *Houghton*, [1902] 1 K. B. 802 (*butter*); *Gage* v. *Elsey*, 1883, 10 Q. B. D. 518 (*watered spirits*)).

The duty of administering the Acts in England devolves upon the following local authorities:—

(*a*) In the administrative County of London, on the Court of Common Council in the City of London, and on the metropolitan borough councils in their respective metropolitan boroughs (38 & 39 Vict. c. 63, s. 10; 62 & 63 Vict. c. 14).

(*b*) On the town councils in County Boroughs, and in quarter sessions boroughs which in 1881 had a population of 10,000 or upwards (38 & 39 Vict. c. 63, s. 10; 51 & 52 Vict. c. 41, ss. 34, 35).

(*c*) In other county districts on the county council (51 & 52 Vict. c. 41, ss. 3, 38, 39).

This obligation involves a duty to appoint analysts, and from time to time, as occasion may arise, to put in force their powers, so as to provide proper securities for the sale of food and drugs in a proper and genuine condition; and in particular to direct their officers to take samples for analysis (62 & 63 Vict. c. 51, s. 3 (1)). In the event of default, the Local Government Board or Board of Agriculture may by order empower an officer to execute the provisions of the Acts named in the order at the expense of the defaulting authority (*ibid.* s. 3, (2) (3) (4)); or, it would seem, may proceed by *mandamus* in a proper case, *e.g.* where an analyst is not appointed.

Local authorities not named above may direct their medical officer, inspectors of nuisances, weights and measures or markets, or police constables appointed by such authority, to take samples of food or drugs, and submit them, if suspected, to analysis, and to take proceedings in cases of contravention of the Acts (1875, s. 13; *Worthington* v. *Kyme*, 1905, 69 J. P. 390).

Analysts.—The first duty of the authorities charged with the execution of the Acts is to appoint an analyst (1875, s. 10), who must supply the proof of competency required by the regulations under sec. 3, subs. 5, of the Act of 1899.

A county council may appoint as many analysts as it likes; and a borough which is under obligation to appoint an analyst may agree that the analyst for the county, or a neighbouring borough, shall act (with

his consent) for the borough (1875, s. 11). The analyst must report quarterly to the appointing authority, and send a copy of the report to the Local Government Board (1875, s. 19). As to the prescribed form of report, see Bell and Scrivener, *Adulteration*, 4th ed., 160, and ANALYSIS; and the Board of Agriculture has power to make regulations as to the standard for milk, butter, and cheese. See regulations of August 5, 1901 (*milk*), and of April 22, 1902 (*butter*), Statutory Rules and Orders Revised, ed. 1904, pp. 6, 9.

Samples.—No proceedings can be taken by public authorities (whether charged with the execution of the Act or not) for contravention of the Acts, unless samples have first been taken in the prescribed manner and analysed. Directions have been issued as to the proper mode of taking samples, but these have value only as advice. See Bell and Scrivener, *Adulteration*, 4th ed., 162 *et seq.*

As to the taking of samples by the Local Government Board or Board of Agriculture, see Act of 1899, s. 2.

The officer appointed to procure the samples must, as a general rule, purchase them by himself, or by an agent sent by himself (*Horder* v. *Scott*, 1880, 5 Q. B. D. 552; *Massey* v. *Kelso*, 1902, 4 Fraser (Justiciary), 73). In the case of margarine, samples may be taken without purchase (50 & 51 Vict. c. 29, s. 10). In the case of milk, the officer may take at the place of delivery a sample of any milk in course of delivery to the purchaser or consignee, in pursuance of any contract for the sale of such milk to the purchaser or consignee (1879, s. 3). In the case of other articles of food, the officer may take samples in course of delivery at the request, or with the consent, of purchaser or consignee (1899, s. 14). The place of delivery means the place where the purchaser takes possession, not where the property passes (*Filshie* v. *Evington*, [1896] 2 Q. B. 200). But an officer cannot exercise this power outside his own district (*M'Nair* v. *Cave*, [1903] 1 K. B. 24). Refusal to allow a sample to be purchased of goods exposed for sale, or in course of delivery, is punishable on summary conviction (1875, s. 17; 1879, s. 4; 1899, s. 16. See *Connor* v. *Butler*, [1902] 2 Ir. Rep. 569).

The purchase or taking of each sample is a separate transaction (*Fecitt* v. *Walsh*, [1901] 2 K. B. 304). But where several similar packets of an article form the subject of a single purchase, they may be combined for purposes of analysis (*Smith* v. *Savage*, [1905] 1 K. B. 88). When a sample has been purchased, the officer must at once notify his intention of submitting it to analysis, and must offer to divide it into three parts, to be then and there separated, and marked and sealed, or fastened up in such manner as its nature will permit; and, if required to do so, give one part to the seller (1875, s. 14; 1899, s. 13). Of the other parts one is handed, or sent by registered parcel post, to the analyst (1875, s. 16; 1899, s. 15), and the other retained for future comparison, or for submission to the government analyst, if required. The sample taken must be of such size that on division each part is sufficient for analysis, but the division into three parts need not be mathematically exact (*Lowery* v. *Hallard*, [1906] 1 K. B. 398).

The obligation as to dividing samples is peremptory, and must be complied with even where adulteration is admitted at the time of sale (*Smart* v. *Watts*, [1895] 1 Q. B. 219).

It applies to the sale of margarine (50 & 51 Vict. c. 29, s. 10), but not to samples of milk taken in course of delivery (*Rolfe* v. *Thompson*,

[1892] 2 Q. B. 196). In that case, or in the case of taking samples of margarine or margarine cheese forwarded by a public conveyance, the taker must send a portion of the sample marked and sealed to the consignor if his name or address appear on the can or package containing the article sampled (1899, ss. 9, 10).

When the analyst certifies that the sample is adulterated, etc., it is the duty of the local authority to prosecute. The form of the analyst's certificate is prescribed by sec. 18 of the Act of 1875, which does not, however, apply to the government analysts. A copy of certificates obtained by the prosecutor must be served with the summons (1899, sec. 19). A certificate not in proper form is insufficient (*Barlow* v. *Noblett*, [1901] 2 K. B. 290). It should state the constituent parts of the sample analysed and the result of the analysis (*Fortune* v. *Hanson*, [1896] 1 Q. B. 202; *Bridge* v. *Howard*, [1897] 1 Q. B. 86); and the weight, if material to the accuracy of the analysis (*Sneath* v. *Taylor*, [1901] 2 K. B. 376); and the facts which are the result of the analysis, and such information as will enable the justices to form an opinion (*Newby* v. *Sims*, [1894] 1 Q. B. 478; *Findlay* v. *Haas*, [1903] 67 J. P. 198). Extraneous observations should not be added, but are not fatal (*Bakewell* v. *Davis*, [1894] 1 Q. B. 296). The certificate is sufficient, but not conclusive evidence of the matters therein stated (Act of 1875, s. 21; *Hewitt* v. *Taylor*, [1896] 1 Q. B. 287), as the defendant may call evidence or require the analyst to attend for cross-examination, or require the third sample to be submitted to the government analyst. It is not a condition precedent to a conviction that the retained sample should have been analysed; but if when produced it is in a condition rendering analysis impossible, before convicting, the magistrate must find that it was properly sealed or fastened (*Suckling* v. *Parker*, [1906] 1 K. B. 527). A certificate of analysis by a public analyst produced for the defence is sufficient evidence, unless the prosecutor requires the analyst to be called. Three days' notice of intention to use such certificate is required (1899, s. 22). Prosecutions by public authorities not directly charged with the execution of the Acts who have purchased for test purposes, are subject to the rules as to analysis, etc., above stated. Private persons, including public bodies, who are aggrieved by the quality of food, etc., supplied to them, may take proceedings for offences under the Acts without going through the procedure of testing samples prescribed in the case of officials (*Buckler* v. *Wilson*, [1896] 1 Q. B. 83), and without having the article analysed (*ibid.*), but are entitled to obtain an analysis from the public analyst of his district under sec. 12 of the Act of 1875. If he does, he must serve the certificate with his summons. The private purchaser is not bound to proceed within twenty-eight days of purchase.

Margarine.—All factories for margarine (defined in sec. 3 of the Act of 1887; and see *Bayley* v. *Pearks*, 1902, 66 J. P. 790), or margarine cheese, and substances prepared in imitation of butter or cheese, must be registered (50 & 51 Vict. c. 29, s. 9; 62 & 63 Vict. c. 51, s. 5), and the occupiers of such factory, and all wholesale dealers in such substances, must keep a proper register of all consignments from factory or warehouse (1899, s. 7). The amount of butter fat in "margarine" is limited to 10 per cent. (1899, s. 8). Margarine, whether imported or home-made, must be consigned as such, and is to be examined by the custom authorities or officers of local authorities, in transit, and samples taken for analysis (s. 8). All packages are to be marked Margarine, or Margarine Cheese (50 & 51 Vict.

c. 29; 62 & 63 Vict. c. 51, ss. 5, 6). The mode of marking is prescribed by the sections above quoted. It is necessary also to mark each parcel exposed for sale by retail, *i.e.* placed in view or sight of prospective purchasers (*Wheat* v. *Brown*, [1892] 1 Q. B. 418; *Moore* v. *Pearce*, [1895] 2 Q. B. 657). Breach of the provisions of the Acts entails a penalty, on summary conviction, of £20 for a first, £50 for a second, and £100 for a third or subsequent offence (s. 4), unless the accused can show that he bought the substance as butter with a written warranty (s. 7). Imprisonment may be awarded on a third conviction if the offence was due to the act, default, or culpable negligence of the accused, and the Court thinks a fine inadequate to meet the case (1899, s. 17). An innocent employer can screen himself by bringing the real offender before the Court (s. 5; and see *Brown* v. *Foot*, 1894, 61 L. J. M. C. 110).

As to other provisions against adulteration, see BEER; BREAD; COFFEE; HOPS; FERTILISERS AND FEEDING STUFFS; MERCHANDISE MARKS; SEEDS (AGRICULTURAL); TEA; TOBACCO AND SNUFF.

Adultery.—The offence of incontinence by married persons.—This offence is not punishable by our law as a crime. Although during the Commonwealth it was enacted that adultery should be adjudged felony, and every person, as well the man as the woman, offending therein, should suffer death without benefit of clergy (*q.v.*), this enactment ceased at the Restoration. Prior to the Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, s. 33, the adultery of either spouse entitled the innocent party to a divorce *a mensa et thoro*, by suit in the Ecclesiastical Court, and a husband could maintain an action for criminal conversation against a person who had illicit connection with his wife. The damages recoverable in this action were properly increased or diminished by the particular circumstances of each case—as, the rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependant of the plaintiff, or being a man of substance. The nature of the seduction, the previous character of the wife, and the husband's treatment of her, were all proper circumstances to be taken into account (Bull, N. P. 26*b*). By sec. 59 of the Act of 1857, actions of criminal conversation were abolished, and a substitute provided by sec. 33, which enacted that any husband might, either in a petition for dissolution of marriage, or for judicial separation, *or in a petition limited to such object only*, claim damages from any person, on the ground of his having committed adultery with the wife of the petitioner. The remedy of limiting the petition to a claim for damages has not been largely resorted to. In the assessment of damages the same principles are to be applied as would have been in an action of criminal conversation; the means of the co-respondent, however, are not to be taken into account; the co-respondent is not to be punished, but the husband is to be compensated, and his own conduct considered (*Keyse* v. *Keyse*, 1886, 11 P. D. 100).

For the provisions of the Act relating to divorce and separation, by reason of adultery, see the article DIVORCE. Even prior to the Act, divorce *a vinculo*, for adultery, was frequently granted to the husband by a private Act of Parliament. Under the Statute of Westminster, 13 Edw. I., stat. i. c. 34, a wife forfeits her dower by reason of her adultery; but the adultery of the husband does not deprive him of his estate by curtesy, and there is no equity to prevent his asserting his

right in such a case (*Sidney* v. *Sidney*, 1734, 3 P. Wms. 276; 24 E. R. 1063). Where a wife commits adultery, the husband's liability for necessaries ceases (*Atkyns* v. *Pearce*, 1849, 2 C. B. N. S. 763). If a wife commits adultery, her husband's obligation to support her ceases, unless he condone the offence. Accordingly, he cannot be convicted under the Vagrancy Act, 1824, 5 Geo. IV. c. 83, s. 3, for wilfully refusing to maintain her, if she has been unfaithful after she left him, and though he may have himself committed adultery (*R.* v. *Flintan*, 1838, 1 Barn. & Ad. 227). Similarly, an order for parish relief cannot be made against a husband under the Poor Law Amendment Act, 1868, if the wife has been unfaithful, and the offence has not been condoned. Proof of adultery is a good defence to a summons for maintenance by a wife under the Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. c. 39, s. 6, unless the husband has condoned, connived at, or conduced to the adultery. It is also good ground for discharging any such order (*ibid.* s. 7). See further, SUMMARY JURISDICTION (MARRIED WOMEN); DIVORCE.

Advanced Members.—See BUILDING SOCIETIES.

Advancement.—The doctrine of equity expressed in the word advancement arises as a counter presumption to that of a resulting trust in cases where a purchaser takes the conveyance or transfer in the name of another. As to resulting trust, see article TRUSTS. The circumstances of one or more of the nominees being a child or children of the purchaser operates to rebut the resulting trust which the law would otherwise imply in favour of such a purchaser; the reason being, that there arises the presumption of intention on the part of such purchaser to make provision for such child or children, which ousts or rebuts the general presumption, and in consequence the child takes the property beneficially, and not as trustee for the purchaser. Thus, in the case of *Dyer* v. *Dyer*, 1788, 2 Cox, 92; 2 R. R. 14, a father purchased copyhold premises, but they were granted to him, to his wife, and to his son William in succession for their lives, and the longest liver of them. The father having survived his wife, devised them to another son; but although the whole purchase-money had been paid by the father, yet the son William was held entitled to them beneficially and not as trustee.

"In every case," says Sir W. P. Wood, "in which anyone asserts that another, in whom it is admitted that the legal estate in any lands is vested, was a trustee for him, the onus lies on him to make good his position; that onus is, however, sufficiently satisfied by the claimant showing that he had the purchase-money, and thereupon the onus is shifted to the other party, who has to show some ground for calling upon the Court to hold that the purchase enured for his benefit, and not merely for the benefit of the person who paid the purchase-money. Again, the fact that the owner of the legal estate is the child of the purchaser is conclusive on his father, unless the presumption of advancement which arises thereupon is rebutted by evidence of contemporaneous acts or declarations" (*Tucker* v. *Burrow*, 1865, 2 Hem. & M. 524).

The doctrine has been placed upon various grounds, as upon the probability arising from the natural love and affection of a parent for his child, and upon his moral obligation to provide for his child according to his means. This latter ground would appear to be the true one, and

therefore it was held in *Bennet* v. *Bennet*, 1879, L. R. 10 Ch. D. 474 (following *In re De Visme*, 1863, 2 De G., J. & S. 17; 46 E. R. 280, which was the case of a mother living apart from her husband), that the presumption does not arise as between a widowed mother and her child, as the mother is in equity under no moral obligation to provide for it.

It makes no difference whether the purchase is taken in the sole name of the child, or in the joint names of the father and child, with or without other persons, and it arises equally in the case of a son or daughter. Doubts were formerly entertained whether the presumption arose where the child was already well provided for; but this distinction, as was said in *Dyer* v. *Dyer*, *supra*, "is not very solidly taken," as "the rule in a Court of equity, as recognised in other cases, is that the father is the only judge as to the question of a son's provision." The present rule may be stated, that the mere fact of ample provision having been made for a child will not of itself prevent the presumption of advancement, although it may be used as a matter of evidence against the presumption. The presumption of advancement may arise not only where the case is one of father and child, but also where one who has placed himself *in loco parentis* is the purchaser. Cases of this kind have usually been those where the purchaser stood in legal or natural relationship towards the nominee, as a grandson whose father was dead (*Ebrand* v. *Dancer*, 1680, 2 Ch. Cas. 26; 22 E. R. 829); a wife's adopted nephew (*Currant* v. *Jago*, 1854, 1 Col. C. C. 261; 63 E. R. 410); possibly in the case of a godson (*Standing* v. *Bowring*, 1885, 27 Ch. D. 341; 31 Ch. D. 282); and of an illegitimate son (*Beckford* v. *Beckford Lofft*, 490, and *per* Wood, V.-C., in *Soar* v. *Foster*, 1858, 4 Kay & J. 152, at p. 157). Although, as we have seen, the presumption does not arise *ipso facto* in the case of a widowed mother and her son (*Bennet* v. *Bennet*, *supra*), yet in such a case very little evidence beyond the relationship would appear to be wanted to prove the intention to make a gift, and it will not be required to be shown that a mother has put herself *in loco parentis* for such purpose. In *Re De Visme*, *supra*, a case in which it was decided that there was no presumption of advancement in the case of a purchase by a married woman living apart from her husband from her separate estate made in the name of her child, the decision went upon the ground of her being under no legal liability to support her child. Since that case, the Married Women's Property Act, 1882, s. 21, has cast this duty upon a married woman where she has separate property, and thus in cases under that Act the ground of the decision seems gone. Nevertheless, if no presumption of advancement towards her child arises in the case of a woman who is a widow, it would seem *à fortiori* not to arise where the mother is still a wife. Although, as we have seen, the presumption of advancement has apparently been made in the case of a father who was considered as standing *in loco parentis* towards his illegitimate son, it was not made in the case of a grandfather who appeared to be *in loco parentis* towards the illegitimate son of his daughter (*Tucker* v. *Barrow*, 1865, 2 Hem. & M. 515, 527). Still less would it appear to arise in the case of a purchaser apparently standing *in loco parentis* towards a mere stranger.

As to what constitutes being *in loco parentis*, the definitions are usually taken from cases of ademption (*q.v.*) of legacies, or satisfaction (*q.v.*) of portions, and such definitions would seem applicable here. It

has been said by Sir W. Grant (19 Ves. 412; 34 E. R. 570), that such a state of things exists where "a person assumes the parental character or discharges the parental duties;" but if this definition is accepted, it must be considered with reference to the purchaser's intention rather than to his acts (*Ex parte Pye*, 18 Ves. 140; 34 E. R. 271; 11 R. R. 173; *Powys* v. *Mansfield*, 1837, 3 Myl. & Cr. 367; 40 E. R. 967; 45 R. R. 277). On this subject, James, L.J., in *Furkes* v. *Pascoe*, 1875, L. R. 10 Ch. 350, observes: "What in any particular case is putting oneself *in loco parentis* is probably one of the most difficult of legal problems to solve. It used to be laid down in treatises that nothing short of assuming the whole functions and duties of the father would do, and, in particular, that such a character could not be predicated where the child was actually living with her own father and maintained by him, and could not be predicated even between a grandfather and grandson if the father were alive. But in the case of *Pym* v. *Lockyer*, 1840, 5 Myl. & Cr. 29; 41 E. R. 283; 48 R. R. 219, before Lord Cottenham, that rule was certainly not acted upon to its full extent. . . . In that case the grandfather had directed and controlled the children, had been referred to on the treaties for their marriages, and had provided marriage portions for them. Nothing of the kind took place in this case. There are very strong expressions about adoption proved by the defendant" (the son of a daughter-in-law, who was the nominee) "himself, but it does not appear that Mrs. Baker" (the purchaser) "ever did provide, or had occasion to provide, for the maintenance, education, marriage portions, or setting out in the world of the children of her daughter-in-law, except that the son did live with her a few years before her marriage, and had a handsome present on his marriage." This and other cases show that adoption is not of itself sufficient to prove cases of standing *in loco parentis*.

The doctrine of advancement has been extended to the analogous case of husband and wife. The ground of the presumption in these cases has been put upon the fact that the wife cannot be a trustee for her husband, also upon the ground of natural affection; but there is little authority as to the doctrine (*Soar* v. *Foster*, 1858, 4 Kay & J. 152, at p. 160). The presumption does not arise where the purchaser is merely cohabiting with a woman as his wife, as with his deceased wife's sister (*ibid.*). The presumption of advancement applies as well to personal as to real estate, and to the case of a voluntary transfer of personal estate (as in the case of stocks and shares), if a resulting trust would otherwise arise (*Batstene* v. *Salter*, 1875, L. R. 10 Ch. 431).

Parol evidence is admissible to show that the purchaser stands *in loco parentis* towards the nominee, and also to show his intention to confer a benefit by way of advancement or bounty, notwithstanding the Statute of Frauds, upon the ground that such evidence is not used to establish a trust, but to rebut one which would otherwise arise by implication of law. Thus, the contemporaneous acts and statements of the purchaser, and of his nominee, if the latter takes part in the purchase, may be given in evidence to negative the presumption of resulting trust, and support that of advancement (*Sidmouth* v. *Sidmouth*, 1840, 2 Beav. 447; 48 E. R. 1254; 50 R. R. 235). Conversely, parol evidence is admissible to rebut the presumption of advancement, and let in the resulting trust (*Williams* v. *Williams*, 1863, 32 Beav. 370; 55 E. R. 145). "For, although a purchase in the name of a wife or child, if altogether unexplained, will be deemed a gift, yet you may take the surrounding

circumstances into consideration, so as to say it is a trust and not a gift" (Jessel, M.R., in *Marshall* v. *Crutwell*, 1875, L. R. 20 Eq. 328). The fact of the purchaser keeping possession of the property and treating it as his own, at the time of the purchase, may be some evidence of his intention not to advance, and under certain circumstances might be sufficient to rebut the presumption (*Stock* v. *M'Avery*, 1872, L. R. 15 Eq. 55), yet is not usually considered sufficient of itself.

But although acts and declarations of the purchaser, subsequent to the purchase, are not admitted in his favour to negative the presumption of advancement, it would seem that they will be admitted to support it. And the subsequent acts and declarations of the child may be used to rebut that presumption (*Standing* v. *Bowring*, 1884, 27 Ch. D. 345).

In a case in which the son was a solicitor, and acted as such for his mother in the matter, his professional position was held to rebut the presumption of advancement, which would not otherwise have arisen (*Garrett* v. *Wilkinson*, 1848, 2 De G. & Sm. 244; 64 E. R. 110). The presumption of advancement being entirely one as to the intention of the purchaser, and thus liable to be itself rebutted or supported by parol evidence, in cases where such evidence exists, as where the parties to the transaction are both alive, the position becomes similar to what occurs in cases when it is a question of gifts and bounty between two strangers in blood.

Advancement of Trial.—In order that a cause may be brought to a more speedy trial than if taken according to its position in the list or paper, some good reason for urgency must be shown. Defendants have no right to object to a cause being heard at any time after it has been set down for hearing, but neither ought one plaintiff to be preferred to another, unless the Court is of opinion that some special ground exists. Where the Crown is a party, however, the Court, on the application of the law officers, will take their cases in the order they suggest. By the 9th Resolution of the judges of the Queen's Bench Division in 1894, any cause in any list for trial may be marked urgent, or fixed for a day certain, on special grounds. By the 13th Resolution, any application to mark urgent a cause not in the week's list is to be made to the judge in chambers; and if in the week's list, to the senior judge sitting at Nisi Prius. In commercial causes the day for trial is fixed on the hearing of the summons for directions. In urgent cases either party may apply to the judge under the summons for the earliest possible day. See COMMERCIAL COURT.

As to the Chancery Division, see Daniell's *Chancery Practice*, 7th ed., vol. i. p. 582.

By Order 50, r. 1A, R. S. C., 1883, where an application is made before trial for an injunction or other order, an "early trial" may be ordered without going into the merits on the application; and this may be at the next or other assizes for any place, if convenient (see *Rob* v. *Rob*, 1887, 31 Sol. J. 494; and *Keenan* v. *Clarke*, 1885, 29 Sol. J. 67). In Admiralty actions (*q.v.*), Order 64, r. 9, provides for appointment, on summons or motion, of an early day for trial, without notice of trial, and with curtailment of time for taking other steps in an action. See *The Avenir*, 1884, 9 P. D. 84.

In the Court of Appeal, an application to advance the hearing,

where the maintenance of certain infants was concerned, was refused (*Mellor* v. *Swire*, 1884, 29 Sol. J. 8).

But in *Lazenby* v. *White*, 1870, 6 Ch. 89, an appeal from an injunction to restrain the use of a trade mark was advanced, on the ground that the continuance of the injunction, if wrongly granted, would cause irreparable injury.

Adventure.—See PARTNERSHIP.

Adventure, Bill of.—This is said to be a writing signed by a merchant ship owner or master, to the effect that goods shipped on board the vessel in his name really belong to, and are at the risk of, another person, to whom he has made himself responsible for the produce. There is a similar phrase to this in French maritime law, *Bill of Gross Adventure*, but this is an instrument making a loan on maritime security, like bottomry. Bills of adventure are apparently now obsolete.

[Bonner, *Dict.* (U. S. 1884); Wharton, *Dict.* (1892).]

Adverse Possession.—In a popular sense there is adverse possession of land when the land is held under a claim of title inconsistent with that of the true owner, and until 1833 this in general coincided with the technical legal meaning of the term. The chief effect of adverse possession was to make the Statute of Limitations run against the true owner, and under the Limitation Act, 1623, 21 Jac. I. c. 16, a period of twenty years barred his right of entry and consequently his right to bring ejectment, though it did not extinguish his title (*Hunt* v. *Burn*, 1702, 2 Salk. 422). Hence adverse possession came in practice to denote possession held under such circumstances as would make the statute run. For this purpose it was in strictness necessary that the adverse possession should have effected a disseisin of the true owner. The Statute of James ran from the time when the owner's "right or title" accrued, and these terms, according to their technical sense, implied that his estate must have been turned to a right of entry by disseisin or ouster (*Reading* v. *Royston*, 1702, 2 Salk. 423; 2 Preston on *Abstracts*, 357). Disseisin, however, was a highly technical matter (see judgment of Lord Mansfield in *Taylor* v. *Horde*, 1737, 1 Burr. 60; 2 Sm. L. C., 11th ed., p. 575), and latterly there was a tendency to adopt the more liberal view, that adverse possession for the purpose of the statute was independent of disseisin, and that it was a question of fact whether or no the possession was inconsistent with that of the true owner (*Cholmondeley* v. *Clinton*, 1820, 2 Jac. & W. 164; 37 E. R. 586; 22 R. R. 845). Thus, where a person who came in under a lawful title held over after his title had expired, the tenancy at sufferance, thereupon created, prevented a disseisin (*Doe* v. *Perkins*, 1814, 3 M. & S. 271); nevertheless it was held in *Doe* v. *Gregory*, 1834, 2 Ad. & E. 14, that he had an adverse possession sufficient to attract the operation of the statute. But even if a technical disseisin was not essential, it was necessary to examine in each case into the character of the possession, and it was not deemed to be adverse when it was taken with the permission of the true owner. Moreover, there were rules which saved it from being adverse in certain special cases. Possession held by a younger brother was deemed to be the possession of the heir, and one of several co-owners held on behalf of

the rest, unless, on entering, he expressly claimed to hold on his own account.

Taking adverse possession in the secondary sense, as possession which makes the statute run, its nature was completely altered by the Real Property Limitation Act, 1833, 3 & 4 Will. IV. c. 27. Under that Act and the Amending Act of 1874, 37 & 38 Vict. c. 57, the period of limitation still runs from the time when the owner's right of entry or action accrues, but instead of making the time of accrual depend upon the fact of adverse possession, specific rules are laid down for ascertaining the time in particular cases. It has thus become unnecessary to decide upon the correctness of the view taken in *Doe* v. *Gregory*, *supra*, and the specific rules just referred to as saving possession from being adverse are expressly abolished (Act of 1833, ss. 12, 13). Further, an owner is no longer safe in allowing possession of his land to be held by another without payment of rent. The occupier becomes tenant at will, and unless the tenancy is expressly renewed, or an acknowledgment of title given in writing, the statute runs from the end of the first year of occupation (Act of 1833, s. 7). See ACKNOWLEDGMENT. Hence it was held, soon after the passing of the Act of 1833, that its effect had been to abolish the old doctrine of adverse possession (*Nepean* v. *Doe*, 1837, 2 Mee. & W. 911; 46 R. R. 789; *Culley* v. *Taylerson*, 1840, 11 Ad. & E. 1015), though the phrase "adverse possession" can still be conveniently used to denote a possession in favour of which the statute is running (*Dean of Ely* v. *Bliss*, 1852, 2 De G., M. & G. 459; 42 E. R. 950). The chief rule under the existing law is that the statute runs against the true owner from the time when he has been dispossessed or has discontinued possession (Act of 1833, s. 3), though, to constitute a discontinuance of possession, there must be an abandonment of possession by one person, followed by the actual possession of another (*M'Donnell* v. *M'Kinty*, 1847, 10 Ir. L. R. 526; *Smith* v. *Lloyd*, 1854, 9 Ex. Rep. 562); but the character of the new possession, whether intentionally adverse or not, is immaterial. The period in which the owner's right of entry or action will be barred is now, for ordinary cases, twelve years (Real Property Limitation Act, 1874, s. 1), and at the same time his title is extinguished (Act of 1833, s. 34), and a good title is vested in the possessor (*Doe* v. *Sumner*, 1845, 14 Mee. & W. 42; 69 R. R. 653; *Scott* v. *Nixon*, 1843, 2 Con. & Law. 194; *Burroughs* v. *M'Creight*, 1844, 1 Jo. & Lat. 303; 68 R. R. 243).

Adverse Witnesses.—See WITNESS.

Advertisement as to Betting.—See BETTING.

Advertisement of Apology.—See APOLOGY.

Advertisement, Substituted Service by.—When efforts have been made to effect personal service of any writ of summons, originating summons, or other document requiring personal service, and such efforts have proved futile, the Court or a judge may order substituted service (R. S. C. Order 9, r. 2; Order 67, r. 6). As to the form of application, and evidence required in support, see SERVICE AND DELIVERY.

Substituted service by advertisement is only resorted to where the party applying is able to satisfy the judge that the ordinary and more

direct methods, such as service by post, or on some persons known to be in communication with the defendant, are not applicable to the circumstances of the case. And he must be further able to show that if notice of the writ were advertised in certain newspapers named, there is reasonable probability of its coming to the knowledge of the defendant. The Court will sometimes order service by advertisement in addition to service on some person known to be in communication with the defendant.

In the County Courts where, by reason of the absence of any party, or from any other sufficient cause, the service of any summons (other than a default or judgment summons, or a summons under the Summary Procedure on Bills of Exchange Act, 1855), petition, notice, proceeding, or document cannot be made, the Court may, upon sufficient evidence, direct substituted service or the substitution for service of notice by advertisement. See County Court Rules, 1903-1906, Order 7, r. 40.

Forms of advertisement are given below.

FORMS.

[The essential features of an advertisement in lieu of service are—(*a*) The title and distinctive number, or reference to the action; (*b*) a copy of the claim on the writ or proceeding commencing the action; (*c*) that it be addressed to the defendant by name; and (*d*) that it should inform him where he may appear or attend, and within what time.

The form usually required in the High Court of an affidavit of service by advertisement is appended, as indicating both the form of advertisement and the form of proof required of the service thereby effected. The prescribed form of advertisement in the name of the registrar of a County Court is also given.]

High Court.

[*Title of Action or Matter.*]

I, of [*address and description of deponent*] make oath and say [*or, if affirming under the Oaths Act*, 1888, do solemnly and sincerely affirm] as follows:—

1. I did, on the day of 19 , serve the above-named defendant *C. D.* with notice of the writ of summons in this action, and of the order for service by advertisement dated the day of 19 , by causing to be inserted [once, *or as may be*] in [*names of paper or papers as ordered*] an advertisement in the words and figures following, namely:—

"In the High Court of Justice, 19 . *B.* No. .
[King's Bench] Division.
Between *A. B.*, . . Plaintiff;
and
C. D., . . Defendant.

"To the above-named defendant *C. D.*

"Take notice, that this action was, on the day of 19 , commenced against you, and that the plaintiff by his writ of summons claims [*here copy the indorsements on the writ*].

"And take notice, that the Court has, by order dated the day of 19 , ordered that the insertion of this notice [once, *or as may be*] in the [*names of papers as ordered*] shall be deemed to be good and sufficient service of the writ on you.

"And further, take notice, that you are required within days [*state number of days allowed by the order for appearance*] after the insertion of this advertisement, inclusive of the day of such insertion, to cause an appearance to be entered for you at the Central Office, Royal Courts of Justice, Strand, London [*or* the District Registry of the High Court of Justice at], and that, in default of your so doing, the plaintiff may proceed with this action, and judgment may be given against you in your absence."

2. The said advertisement appeared in the [*name of paper*] on the day of 19 , and in the [*name of paper*] on the day of 19 [*as the case may be*].

3. The said writ appeared to me to be duly issued and dated the day of 19 , and was, with the copy thereof, subscribed and indorsed in the manner and form prescribed by the Rules of the Supreme Court.

4. I did, on the day of 19 [*date to be within three days from the insertion of the last of the advertisements ordered*], indorse on the said writ the day of the month and the week when the said service on the said defendant was completely effected.

Sworn [*or* affirmed] at , in the county of , this day of 19 .
Before me,

[*Signature of deponent.*]

A Commissioner for Oaths.

This affidavit is filed on behalf of the plaintiff.

(See also Daniell's *Chancery Forms*, 149; Chitty's *Forms*, 79.)

COUNTY COURT.

To of , in the county of .

Take notice, that a plaint has been entered, and a summons issued against you in the County Court, by of aforesaid, for [*here state the claim*], and an order has been made that the publication of a notice of the entry of such plaint, and the issue of the summons, in the [*name of paper*] and the [*name of paper*], shall be deemed to be service of the summons upon you. The summons will be heard at the Court House, situate in , in the county of aforesaid, on the day of 19 , at eleven o'clock in the forenoon, on which day you are required to appear; and if you do not appear either in person or by your solicitor at the time and place above mentioned, such order will be made, and proceedings taken, in your absence as the judge may think just and expedient.

Dated this day of 19 .

[*Name of registrar.*]
[*Name of plaintiff's solicitor.*]

Advertisements, Indecent.—By the Indecent Advertisements Act, 1889, 52 & 53 Vict. c. 18, s. 3, penalties are imposed on persons by whom any picture or printed or written matter of an obscene nature, or indecent advertisement, is exhibited to public view or placed so as to be visible to persons passing along a public highway or using an urinal, or is given away or offered to such persons, or is delivered to anyone for the purpose of being so exhibited; and by sec. 4 penalties are imposed on persons who give or deliver such advertisements to others with intent that they may be delivered or exhibited in contravention of sec. 3. The phrase "indecent advertisement" is defined by sec. 5 of the Act, and sec. 6 authorises any constable to arrest without a warrant any person whom he may find committing any offence against the Act. As to the proper mode of procedure under the Act, see *Hamilton* v. *Walker*, [1892] 2 Q. B. 25. By the Post Office Protection Act, 1884, 47 & 48 Vict. c. 76, penalties are imposed on persons who send or attempt to send postal packets which contains indecent or obscene prints, etc.

Advertisements of Queen Elizabeth.—Advertisements [or articles] "for the due order in the publique administration of common prayers and usinge the holy sacramentes and for the apparel of all persons ecclesiasticall, by virtue of the queen majesties letters commanding the same, the 25th day of January in the seventh year of the raigne of our soveraigne lady Elizabeth." These "Advertisements" were drawn up in 1564-65 by Matthew Parker, who was at that time Archbishop of Canterbury, and other bishops in commission with him, in obedience to peremptory letters addressed to them by Queen Elizabeth, that they should take steps for the establishment of religious uniformity, in view of the varieties at that time existing in religious observances in the Church of England. In obedience to these commands, the archbishop and some bishops proceeded to compile the articles, subsequently known as the "Advertisements." The Queen's Council, however, refused to confirm them; but the archbishop, according to Strype (Strype's *Parker*, 314), thought it advisable to print and to publish them on their episcopal authority. "But because the book wanted the queen's authority, they thought not fit to term the contents thereof Articles or Ordinances, by which name they at first went, but by a modester denomination, viz., Advertisements." The Privy Council in 1877 (*Ridsdale* v. *Clifton*, L. R. 2 P. D. 276, at p. 311) stated that the word advertisements was a "word which, in the language of the time, was equivalent to admonitions or injunctions." These Advertisements were subsequently revised and altered, and, after being submitted to Cecil, the Secretary of State, were published in 1566. It seems possible that in some way the royal approval was indirectly given to them; but the queen apparently never gave an official sanction to them, but left them "to be enforced by the several bishops on the canonical obedience imposed upon the clergy and the persons conveyed to the ordinaries by the Act of Uniformity." Strype (Strype's *Parker*, vol. i. p. 319) considers that these Advertisements eventually became of force and recovered their first name of Articles and Ordinances. Later documents refer to them as authoritative, but quote them still as "Advertisements." In modern times the question arose as to whether sec. 25 of the Act of Uniformity, 1 Eliz. c. 2, must be read together with the order made thereunder by the Advertisements, or, in other words,

whether the directions in the Advertisements could be described as a "taking order" under the above section. A further question arose as to whether, having regard to the rubric note of the Prayer-Book of 1662, and the Act of Uniformity of 1662, 13 & 14 Car. II. c. 14, ss. 24 and 25, the Advertisements, assuming them to have attained legal authority, were not repealed as from 1662.

Under the Act of Uniformity, 1 Eliz. c. 2, s. 25, it was enacted "That such ornaments of the Church and of the ministers thereof shall be retained and be in use as was in this Church of England by authority of Parliament in the second year of King Edward VI., until such other order shall be taken by the authority of the Queen's majesty, with the advice of her Commissioners appointed and authorised under the great seal of England for causes ecclesiastical or of the Metropolitan of this realm." See ORNAMENTS RUBRIC.

In *Elphinstone* v. *Purchas*, 1870, 3 Ad. & Ec. 66, the Court of Arches (Sir R. Phillimore) held that the issue of these Advertisements could not be considered as a taking of further order under the Act 1 Eliz. c. 2, so as to make the vestments authorised under the first Prayer-Book illegal. This decision was reversed in *Hebbert* v. *Purchas*, 1870, L. R. 3 P. & D. 605, the Privy Council holding that the ornaments rubric, prefixed to the order for morning and evening prayer, must be construed with the Advertisements and the Act of Uniformity, 1662, 13 & 14 Car. II. c. 4, so as to make the use of such vestments illegal. In *Clifton* v. *Ridsdale*, 1877, 2 P. D. 276, when the question was again argued, the Privy Council again held that the Advertisements were a taking of order within the Act of Parliament by the queen with the advice of the Metropolitan, and that sec. 25 of the Act of Uniformity, 1662, must be read as if the order had been inserted therein. On this decision, Sir Walter Phillimore, *Ecclesiastical Law*, observes: "This decision was, however, by the majority only. It has been subjected to severe criticism. One of the members of the Privy Council, Lord Selborne, has taken the unusual course of writing a book to justify it, in answer to Mr. Parker, and the question cannot yet be considered as settled."

[*Authorities.*— Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. pp. 711-712. See also UNIFORMITY, ACTS OF; ORNAMENTS RUBRIC; Strype's *Parker*, *supra*; Cardwell's *Synodalia*, *supra*. See also authorities cited in the cases, *supra*.]

Advertising for Stolen Property.—A forfeiture of £50 is incurred by any person who prints or publishes any notice, publicly advertising a reward for the return of property stolen or lost, which contains words purporting that "no question will be asked," or that the person producing the property will not be arrested, or that persons who have bought or lent on the property will be repaid their loan or advance, or any reward for its return (Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 102). Dogs are property within this section (*Mirams* v. *Our Dogs Publishing Company*, [1901] 2 K. B. 564).

Such advertisement is an offer to compound a felony. The forfeiture is recoverable by action by a common informer, to be brought within six months; and cannot be brought against the printer or publisher of a newspaper, without first obtaining the written assent of the Attorney-General (24 & 25 Vict. c. 96, s. 102; Larceny Advertisements Act, 1870, 33 & 34 Vict. c. 65, s. 3). See HUSH MONEY.

Advertising Vehicles.—It is unlawful for the proprietor of a metropolitan stage or hackney carriage, to suffer any notice, advertisement, or printed bill, etc., to appear upon the outside or inside of such carriage, so as to obstruct the light or ventilation, or cause annoyance to any passengers (16 & 17 Vict. c. 33, s. 15). It is also unlawful for any person to carry about on any carriage, or on horseback, or on foot, in any thoroughfare or public place within the Metropolitan Police District or the City of London, to the obstruction or annoyance of the inhabitants or passengers, any picture, placard, notice, or advertisement, whether written, printed, or painted upon or posted or attached to any part of the carriage, or any board or otherwise (16 & 17 Vict. c. 33, ss. 16, 20). No picture, print, board, placard, or notice, except in such form and manner as may be approved by the Commissioner of Police, shall, by way of advertisement, be carried or distributed within a radius of six miles of Charing Cross by any person riding in any vehicle, or on horseback, or being on foot (30 & 31 Vict. c. 131, ss. 4, 9; 48 & 49 Vict. c. 18). This does not apply to newspapers. There is no general statute regulating advertising vehicles outside the Metropolitan Police District, and reference must be made to the special Acts of the local authorities.

Advice Note.—The effect of terms contained in an advice note, purporting to limit the liability of the sender, was considered in *Mitchell* v. *Lancashire and Yorkshire Railway Co.*, 1875, L. R. 10 Q. B. 256. The plaintiff was the consignee of flax sent by the defendants' railway to a certain station. On its arrival the defendants sent to the plaintiff an advice note of its arrival, requiring him to remove it, and stating that the defendants would hold it, "not as common carriers, but as warehousemen, at owner's sole risk, and subject to the usual warehouse charges." After receipt of this notice, plaintiff went to the station and removed two tons of the flax, but left the rest at the station for more than two months. There was no warehouse at the station, and the flax remained on open ground, insufficiently covered, and became damaged by wet. It was held that, treating the advice note, acquiesced in by the plaintiff, as a contract, its terms did not exempt the defendants from liability for negligence, to the extent that they would be liable as warehousemen or bailees for hire. The above case is cited with approval in *Price & Co.* v. *Union Lighterage Company*, [1903] 1 K. B., at p. 754. See BAILMENTS.

Advice of Court.—By Order 55, r. 3, of the Rules of the Supreme Court, executors and administrators, and any person claiming to be interested as creditor, devisee, legatee, next-of-kin, or heir-at-law of a deceased person, or as *cestui-que trust*, under any deed or instrument (either directly or by assignment), may apply by originating summons (*q.v.*) for the determination of any question arising in the administration of the estate or trust. This provision has practically superseded applications to the Court for advice by trustees, and other persons interested in trust property, under Sir George Turner's Act, 13 & 14 Vict. c. 35, repealed by the Statute Law Revision Act, 1883, 46 & 47 Vict. c. 49, or Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 30, repealed by the Trustee Act, 1893, 56 & 57 Vict. c. 53, which enabled such persons to obtain the advice and directions of the Court summarily, by special case or petition, and protected them in acting upon the

advice or directions given. Both the Acts referred to have been repealed, but the power of stating a case under Sir George Turner's Act, and the provision contained in it (s. 15), protecting every executor, administrator, trustee, or other person, making any payment or doing any act in conformity with the declaration of the Court, are preserved by Order 34, r. 8 (*Forster* v. *Schlesinger*, 1886, 54 L. T. 51). A declaration or opinion of the Court upon originating summons under Order 55, appears to give an equally complete protection to persons acting upon it (see *per* Stirling, J., *In re Partington*, 1888, 57 L. T. 660), for the Court has the same jurisdiction upon the summons as if it were administering the trust in an action (*Conway* v. *Fenton*, 1888, 40 Ch. D. 512). No action or proceeding is now open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed, or not (Order 25, r. 5). But the judges commonly decline to express opinions or to make declarations where there is no necessity for or advantage in having an immediate determination of the question (see notes to Order 25, r. 5, in the *Annual Practice*).

As to the form of an originating summons, for the opinion of the Court, see Order 54, r. 4*b*. The questions upon which an opinion is required should be stated categorically, and not in general terms only, such as "who is entitled" (*In re Harman*, [1894] 3 Ch. 607). According to the practice in the Chancery Division, a fee to counsel for settling the summons is allowed on taxation.

Advice on Evidence.—It is customary in all actions in the High Court, after the pleadings have been closed, to lay the papers in the case before counsel, in order that he may advise upon the evidence necessary to support his client's case, and the steps necessary in order to prepare for the trial. Although the rules of evidence, and the practice according to which evidence is adduced have in modern times been considerably simplified, this step in litigation is still of great importance. It is rarely omitted, and is always treated upon taxations of costs as necessary and proper. In framing the opinion, the case is first analysed in order to ascertain what are the issues involved, and then each issue in turn is considered, and the evidence to be adduced in support of the party's contention in regard to it, or in rebuttal of that of his opponent, is indicated. So far as the former operation is concerned, the matters dealt with are matters of substantive law, and assistance in regard to them is to be obtained from the ordinary text-books and digests. See the special articles throughout this work.

When the issues have been defined, it is often necessary to consider the right to begin at the trial (see BURDEN OF PROOF).

The modes of proof may be distinguished as proof by admissions, by witnesses, and by documents. The documents put in evidence must usually be themselves proved by witnesses to handwriting or otherwise, so that the division is not exhaustive. In some cases, moreover, presumptions of law, or presumptions of fact which the law makes in the absence of evidence to the contrary, avoid the necessity of proof. (See PRESUMPTION.) The most important mode of obtaining admissions is by interrogating the opposite party (see INTERROGATORIES and ADMISSIONS), and if discovery in this form has not been had, it will be necessary to consider whether it should be applied for, or, if it has been obtained, to

consider whether the answers are sufficient. A notice to admit facts under Order 32, r. 4, may be advisable. The principal evidence in the case is generally that of witnesses given *vivâ voce* in Court (Order 37, r. 1), but the parties may agree to take the witnesses' evidence wholly or in part by affidavit (Order 37, r. 1; Order 38, rr. 25-30), in which case the regulations of the last-cited rules must be carefully attended to. It may be necessary to take evidence on commission. (See COMMISSION, EVIDENCE ON.)

Discovery of documents should be applied for in almost all cases. The proof of public documents is in many cases governed or facilitated by special statutory rules. A very convenient table of these is to be found in Wills on *Evidence*, and they are also collected in Roscoe and Taylor on *Evidence*. The rules, which in general forbid the production in evidence of copies, or other secondary evidence of documents, must be carefully considered, and the notices to produce should be settled. (See DOCUMENTS, PROOF OF.) Notices to admit documents are usually given.

Expense and trouble in the proof of particular facts may often be saved by the aid of Order 30, r. 7, which enables the Court or a judge to give special directions as to this. Great advantages have been recently obtained from this rule in the Commercial Court (*q.v.*), but its operation extends equally to all branches of the High Court (*Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488). It is remarkable that the power conferred by it is not more often invoked (see *per* Lord Russell, C.J., in 72 L. T. 850). Besides the matters above referred to, the questions of sufficiency of parties and of place and mode of trial have often to be reconsidered when preparing the opinion on evidence. The proper time for the opinion to be obtained is usually before notice of trial is given (see Odgers on *Pleading*, 5th ed., 1903, p. 284; and Cole on *Ejectment*, p. 140).

Ad vitam aut culpam.—An office is said to be held *ad vitam aut culpam* when the tenure of the holder is determinable only by his death or delinquency, one which is in fact held *quamdiu se bene gesserit.*

Advocate.

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One who pleads the cause of another in a Court of law, or other judicial tribunal.

His Duty:—Is twofold—to advise his client before going into Court, and to act for him when in Court.

The Right of Advocacy in the House of Lords, Privy Council, Courts of Appeal, Chancery and Queen's Bench Division (Common Law), and Probate, Divorce and Admiralty Division, is limited to barristers. [In Parliament, before private bill committees, solicitors are heard only if registered as agents for the petition (May, *Parly. Practice*, p. 771). In Quarter Sessions solicitors have a right of audience only in those cases

where there is no regular attendance of the Bar (see *Ex parte Evans*, 1846, 9 Q. B. 279). The right of solicitors to appear before the new licensing committees, established under the Licensing Act, 1904, has been allowed by most Courts of Quarter Sessions, but the matter is one entirely for the individual Courts, some of which have restricted right of audience to the Bar alone. In any case, a solicitor appearing cannot do so as advocate for another solicitor.] In the bankruptcy branch of the High Court, in the County Courts and in Police Courts, solicitors have the right; but in the case of County Courts, the solicitors entitled to audience are those only who are generally retained in the action, [and a managing clerk, though himself a solicitor, cannot appear in a matter for which his employers are retained without leave of the judge (*R.* v. *Snagge*, [1894] 2 Q. B. 440)]. In exercise of the power which an arbitrator has of regulating the proceedings before him, he can refuse to allow the parties to be represented by advocates (Redman on *Arbitration*, p. 118). Under sec. 9 of the Local Government Act, 1894, an arbitrator holding a public inquiry, for the purposes of the section, shall not, except in such cases as may be prescribed, hear counsel. [In the Mayor's Court of London, though this is not a superior Court, barristers alone are heard in open Court on the trial of issues of law or fact. Counsel may not appear in the Court of a Revising Barrister (6 Vict. c. 18, s. 141).]

Retainers—General.—General retainers are either ordinary or limited. An ordinary general retainer applies to the Supreme Court and House of Lords. A limited general retainer applies to the tribunal or tribunals or Court or Courts to which it is expressed to be limited. A separate general retainer must be given for the Privy Council. A separate general retainer must be given for parliamentary committees. If the counsel who has accepted a general retainer from one party should be offered a special retainer or brief by another party, the general retainer entitles the party who has given it to reasonable notice before the offered special retainer or brief is accepted. Subject to these rules, a general retainer lasts for the joint lives of the client and counsel, unless the same be forfeited. In case a special retainer or brief is offered to counsel by a party other than the party from whom he has accepted a general retainer, the counsel, after giving notice to the party from whom he has accepted the general retainer of the offer of the special retainer or brief, is at liberty to accept the special retainer or brief of the other party, unless a special retainer or brief be given within a reasonable time by the party from whom he has accepted the general retainer. Where a general retainer has been given, and a brief is not delivered to the retained counsel in any action or other proceeding in which the party giving the general retainer is concerned, and to which it applies, or a special retainer or brief is not given within a reasonable time after a notice has been given by the counsel holding a general retainer, that a special retainer or brief has been offered to him by another party, the general retainer is forfeited; provided that the holding of a general retainer does not entitle a King's Counsel to the delivery of a brief on occasions when it is usual to instruct a junior counsel only. Where a general retainer has been given for one person, and he is party to a proceeding with others and appears separately, the retainer applies to that proceeding; but if he appears jointly with others, the retainer does not apply, and remains unaffected.

Special.—A special retainer cannot be given until after the commencement of an action, appeal, or other proceeding. A special retainer in an action or proceeding in the Supreme Court gives the client a right to the services of the counsel while the action or proceeding remains in or under the control of that Court. A special retainer in an action or proceeding, other than an action or proceeding in the Supreme Court, gives the client a right to the services of the counsel during the whole progress of such action or proceeding. A counsel who has been specially retained is entitled to the delivery of a brief on every occasion to which the special retainer applies; provided always: A special retainer does not entitle a King's Counsel to the delivery of a brief on occasions when it is usual to instruct junior counsel only. Where more than one junior counsel has been retained, only one of such junior counsel is entitled to the delivery of a brief on occasions when it is usual to instruct one junior counsel alone.

Circuit Retainers.—A special retainer must be given for a particular assize. If the venue be changed for another place on the same circuit, a fresh retainer is not required. If the action be not tried at the assize for which the retainer is given, the retainer must be renewed for every subsequent assize until the action is disposed of, unless a brief has been delivered. A retainer may be given for a future assize, without a retainer for an intervening assize, unless notice of trial shall have been given for such intervening assize.

On Appeals.—When a counsel has held a brief for any party in an action or proceeding, but has not received a general or special retainer, he shall not accept a general retainer or special retainer or a brief on appeal (including in that expression appeals to the House of Lords and to the Privy Council) for any other party, without giving the original client the opportunity of retaining or delivering a brief to him.

Opinions and Pleadings.—Counsel who has drawn pleadings or advised, or accepted a brief, during the progress of an action on behalf of any party, shall not accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings or advised, or on whose behalf he has accepted a brief, the opportunity of retaining or delivering a brief to him, but such counsel is entitled to a brief at the trial, and on any interlocutory application where counsel is engaged, unless express notice to the contrary shall have been given to him with the instructions to draw such pleadings or advise, or at the time of the delivery of such brief. Provided always, such counsel shall not be entitled to a brief in any case where he is unable or unwilling to accept the same without receiving a special fee. No counsel can be required to accept a retainer or brief or to advise or draw pleadings in any case where he has previously advised another party on or in connection with the case, and he ought not to do so in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by the other party, or in which his acceptance of a retainer or brief or instructions to draw pleadings or advise would be inconsistent with the obligation of any retainer held by him; and in any such case it is the duty of the counsel to refuse to accept such retainer or brief, or to advise or to draw pleadings, and in case he has received such retainer or brief inadvertently, to return the same. The retainer of a counsel does not cease upon his being promoted to a higher rank at the Bar.

Amount of Fees.—The fees for *general* retainers are as follow:—

In Parliament (committees) . . .	*Ten Guineas.*
In all other cases	*Five Guineas.*

The fees for *special* retainers are as follow:—

In Parliament (committees) . . .	*Five Guineas.*
In the House of Lords and Privy Council .	*Two Guineas.*
In all other cases	*One Guinea.*

The Relation of Advocate and Client.—The relation creates the incapacity to make a contract of hiring as an advocate, and the services of an advocate create neither an obligation nor an inception of an obligation, nor any inchoate right whatever, capable of being completed and made into a contract by any subsequent promise (Erle, C.J., in *Kennedy* v. *Broun*, 1862, 13 C. B. N. S. 677). Consequently, if the advocate fails to render the services for which he is retained, or performs them negligently, the client has no remedy against him either to recover back the fee paid or for damages for his failure or negligence. As to admissions by counsel, see ADMISSIONS; PRIVILEGED COMMUNICATIONS.

How Remunerated.—By the payment of a fee or honorarium, which when offered he is at liberty to refuse or accept, but if unpaid he cannot recover by an action. And if the client has paid the advocate's fee to the solicitor, the advocate cannot recover it from the solicitor as money paid to his use (see *In re Le Brasseur & Oakley*, [1896] 2 Ch. 487, 493). [It would appear, however, that a barrister may prove in the bankruptcy of a solicitor for the amount of fees which the solicitor has actually received (*In re Hall*, 1856, 2 Jur. (N. S.) 1076; *Ex parte Colquhoun; In re Clift*, 1890, 38 W. R. 688.] If in his professional character as an English barrister he accepts a retainer to appear and plead before commissioners or arbitrators in a foreign country, by whose law counsel practising in its regular Courts were permitted to have suit for their fees, that would not give him a right of action for his *honoraria* (*R.* v. *Doutre*, 1884, 9 App. Cas. 752).

Scope of his Authority.—The authority given by the client to the advocate is as follows:—When acting as an advocate in Court, he has unlimited power to do what is best for his client in the cause. "His retainer gives him complete authority over the suit, the mode of conducting it, and all that is incident to it, such as withdrawing the record, withdrawing a juror, or calling a witness, or selecting such as in his discretion he thinks ought to be called, and all other matters which properly belong to the suit and the management and conduct of the trial" (*Swinfen* v. *Lord Chelmsford*, 1860, 5 H. & N. 890; *Strauss* v. *Francis*, 1866, L. R. 2 Q. B. 379).

Limitation.—He has not, by virtue of his retainer, in a suit any power over matters that are collateral to it. And if the other side is told that his authority has been withdrawn or is limited, the client will not be bound by any act of the advocate in the one case, or outside the limited authority in the other (*Swinfen* v. *Swinfen*, 1856, 1 C. B. N. S. 364).

Revocation.—Where a party appears in Court by counsel, and the case is on, and the counsel has been fully seized of it, his authority cannot be revoked by his client so as to give the client himself the right to address the Court. But if counsel is not so seized, or where upon a motion the hearing has gone no farther than reading affidavits, and the counsel has addressed no arguments to the Court, he may at the instance of his client

be permitted to withdraw, and the client may himself be heard (*R.* v. *Muzbury*, 11 L. T. 566).

His power to Agree, Settle, Refer, and Compromise.—If, acting within the limits of his apparent authority, he enters into an agreement with the counsel on the other side, this agreement is binding on the client (*Strauss* v. *Francis*, 1866, L. R. 1 Q. B. 379). It seems that in general a reference by the consent of counsel in a cause will be binding upon the client. Certainly, if the client is present and does not repudiate the authority (Redman on *Arbitrations*, 15). When a compromise is contemplated, and litigation is to cease upon terms to be arranged, counsel can then only act under special instructions (Crowder, J., in *Swinfen* v. *Swinfen*, 1856, 1 C. B. N. S. 364). Counsel in a breach of promise of marriage action was held to have authority to agree to judgment being entered for the defendant upon terms, but not to agree to deliver up the defendant's letters (*Kempshall* v. *Holland*, 1895, 14 R. 336). [This question was raised in *Neale* v. *Gordon Lennox*, [1902] A. C. 465, in which case the House of Lords held that the Court had jurisdiction to set aside an agreement to refer an action on certain terms, such agreement having been entered into by counsel who had exceeded his authority, even though the limitations to his authority were not known to the other side.]

Consent.—When counsel has once given his consent to a compromise, and there has been no mistake or error, that consent cannot be withdrawn (*Harvey* v. *Croydon*, 1884, 26 Ch. D. 249).

Mistake.—But if he says, "I made a concession under a misapprehension," he will not be held bound to the mistake (*Holt* v. *Jesse*, 1876, 3 Ch. D. 180; *Hickman* v. *Berens*, [1895] 2 Ch. 638).

His Evidence was formerly always obtained by his statement from his place in Court, and not by affidavit (*Law Jo.* vol. 30, p. 693); but nowadays he sometimes goes into the box like any other witness.

Exceeding or Abusing his Authority.—For this the client has no remedy against him. If, however, an advocate, although he has unlimited power in respect of the conduct of a cause in Court, does what the Court may think wholly unjust as between the parties, then the Court would have power to overrule what was done and send the case for a new trial (*Mathews* v. *Munster*, 1888, 20 Q. B. D. 141).

In Criminal Cases.—As prosecuting counsel the function of the advocate is that of an official of justice, not of a partisan, and extreme fairness is a law governing his duty. The same rule holds good in lunacy proceedings. See LUNACY. A defending counsel, whilst he may put forward any theories on behalf of his client, should not state to the jury, as actual existing facts, matters which he has been told in his instructions on the authority of the prisoner, but which he does not propose to prove in evidence (Roscoe, *Crim. Ev.* 204). But a prisoner defended by counsel may, at the conclusion of his counsel's speech, make his statement to the jury, with this proviso, that what he states from the dock is subject to the right of reply on the part of the prosecution, as being in the nature of new matter laid before the jury (*R.* v. *Skimmin*, 1849, 15 Cox C. C. 122). *The right of reply* exists where evidence is given for the defence, but is rarely exercised. The Attorney-General in person has the right of reply, whether evidence is given by the defence or not. See ATTORNEY-GENERAL; and see also REPLY.

[The Criminal Evidence Act, 1898, has somewhat altered procedure in

those cases to which it refers. Where a prisoner gives evidence on his own behalf, he may be cross-examined by the prosecuting counsel, and if he brings forward any other witness than himself, then the prosecuting counsel has a right of reply. In accordance with the principles of English criminal law, this right of reply is seldom exercised unless something new arises out of the evidence. See also as to advocate's general position in a criminal case, Bowen-Rowlands on *Criminal Proceedings*, 1904, pp. 141 *et seq.*]

Immunity from Action for Defamation.—The privilege of an advocate with respect to defamatory words, uttered by him as advocate in the course of a judicial inquiry, is absolute and unqualified. No action can be maintained against him for such words, even though they were irrelevant and spoken maliciously and without reasonable cause. "The Court can control all the proceedings and persons before them, and safeguards are thus provided against licence and excess; but if such an action as this were allowed, no person would be free from fear, arduous duties could not be efficiently performed, and the public would be injured" (Fry, L.J., in *Munster* v. *Lamb*, 1883, 11 Q. B. D. 588). He may be punished for contempt of Court (*q.v.*), even for language professedly used in the discharge of his functions as an advocate (*Ex parte Pater*, 1863, 5 B. & S. 299).

Maintenance.—An exception to the general rule with regard to maintenance of actions is the case of counsel. See also BAR.

Advocate, Crown.—See ADVOCATE, KING'S.

Advocate-General.—See ADVOCATE, KING'S.

Advocate, Lord.—The Lord Advocate is the chief law officer of the Crown in Scotland, and one of the great officers of State in Scotland. He is appointed by the Crown, and it is his duty to act as public prosecutor, and to plead in all cases in which the Crown is interested. He has power to issue warrants for arrestment and imprisonment in any part of Scotland. Both of the Scottish law officers are allowed to engage in private practice. Since the Union, the Lord Advocate has generally sat in Parliament. The Act 48 & 49 Vict. c. 61, which created the office of Secretary for Scotland, did not affect the powers and duties of the Lord Advocate.

In Scotland the consent of the Lord Advocate—as in England the consent of the Attorney-General—is required for the initiation of many proceedings, as, *e.g.* the recovery of statutory penalties; and so, in patent and lunacy matters, the Lord Advocate exercises functions similar to those of the Attorney-General, except that, as regards patents, the fiat of the Lord Advocate is required in all cases.

[Kames' *Statute Law*, see "King's Advocate"; Bell's *Dictionary* and *Digest of the Law of Scotland*.] See ATTORNEY-GENERAL.

Advocate, King's.—His Majesty's Advocate-General, often called for shortness the King's Advocate, and during the reign of her late Majesty, the Queen's Advocate, was the principal law officer of Her Majesty in the College of Advocates at Doctors' Commons, and in the Admiralty and Ecclesiastical Courts, just as the King's or Queen's Procurator or Proctor filled for those Courts, and the matters discussed

therein, the functions assigned in the superior Courts of law and equity to the Solicitor for the Treasury. Before the High Court of Delegates, and at the bar of the Privy Council, where advocates and barristers had both right of audience, an advocate took precedence of an ordinary barrister (*Blackstone*, 1890, iii. 394); and before the same Courts the Advocate-General took precedence in like manner of the Attorney-General and Solicitor-General (*Barton* v. *R.*, 1840, 2 Moo. P. C. 29; 12 E. R. 913; *Dyke* v. *Walford*, 1846, 5 *ibid.* 447; 13 E. R. 562; 70 R. R. 75; *Harrison* v. *R.*, 1856, 10 *ibid.* 201; 14 E. R. 469; Manning, *Serviens ad Legem*, 1840, 19 and 20; Stewart, *Blackstone*, 1840, iii. 29); and in cases laid by the Crown before the three law officers for their opinion, the Advocate-General had the precedence. Thus, in the joint opinion given in the *Bishop of Clogher's Case* in 1822, Sir Christopher Robinson took precedence of Lords Gifford and Lyndhurst, then Attorney- and Solicitor-General (Phillimore, *Eccl. Law*, i. 73). When, however, barristers and advocates were admitted to practise equally in all Courts, it was felt that the Attorney-General could have no leader in Westminster Hall; and accordingly, on the resignation of Sir John Harding in 1862, and the appointment of Sir Robert Phillimore, the Crown directed that the Attorney-General and Solicitor-General should take precedence, in the future, of the King's Advocate. On the appointment of Sir Robert Phillimore in 1867 to be judge of the High Court of Admiralty, the place was filled by Sir Travers Twiss, and, since the latter's resignation in 1872, the office has not been filled up.

It was the practice that the Advocate-General should represent the Crown in all matters in the Admiralty and Ecclesiastical Courts (*King's Proctor* v. *Stone*, 1808, 1 Hag. Con. 424; *The Rebekah*, 1799, 1 Rob. C. 228); and that in all international and ecclesiastical questions his opinion should be taken, either with or without the law officers of the Crown. He was specially consulted by the Foreign Office, and Orders in Council used to be submitted to him for his approval. After the fusion of the two Bars, he appeared with the other law officers in such cases as *A.-G.* v. *Sillem* (*The Alexandra*, 1863, 2 H. & C. 431, an offence against the Foreign Enlistment Act), and *Ryves* v. *A.-G.*, 1868, 37 L. J. Matr. 75.

The second law officer of the Crown in the Admiralty Court was the Admiralty Advocate, whose duty it was to appear for the Crown in its office of Admiralty. "The distinct capacities of the King claiming *jure coronæ* and in his office of Admiralty occasioned a necessary distinction of officers employed to enforce his rights—a King's Advocate and King's Proctor or Procurator-General—an Advocate of the Admiralty and Proctor for the King in his office of Admiralty" (Browne, *Civil Law and Law of Admiralty*, 1802, 67). He had been originally the Advocate for the Lord High Admiral. In certain cases, where it was disputed whether the Crown was entitled *jure coronæ* or in its office of Admiralty, the King's Advocate and the Admiralty Advocate represented their different departments against each other (*The Rebekah, ante*, a question whether an enemy's ship was prize or a droit of Admiralty; *The Panda*, 1842, 1 Rob. W. 423, a question whether the property of pirates was prize or a droit of Admiralty, Sir J. Dodson being the Queen's Advocate and Dr. Phillimore the Admiralty Advocate). At times both officers appeared for the Crown in its office of Admiralty together (*R.* v. *Belcher*, 1849, 6 Moo. P. C. 471; 13 E. R. 766, a piracy case). The office is now vacant.

It is worthy of notice that the title Advocate is still used in some of our colonies and possessions to denote the chief law officer of the Crown there: thus, in Sierra Leone, Lagos, and Cyprus, he is called the King's Advocate; in Malta, the Crown Advocate; in Mauritius, the Procureur and Advocate-General; and in the Indian Presidencies, Advocate-General.

Advocates, College of.—In England, an advocate was a member of a society of men voluntarily associated as a distinct profession for the practice of the civil and canon law. Some of the members of this body purchased, in 1567, the site of Doctors' Commons, and, at their own expense, erected houses for the residence of the judges and advocates, and proper buildings for holding Ecclesiastical and Admiralty Courts. By a rescript of Chas. II. after the Fire of London, they were exempted from "payment of taxes, burdens, and impositions, in the same way as the societies of the Serjeants' Inn." In 1768 a royal charter was obtained, by which the members of the society and their successors were incorporated under the name of the "College of Doctors of Law exercent in the Admiralty and Ecclesiastical Courts." The president of the college was the Dean of Arches, and the fellows were elected after admission by rescript of the Archbishop of Canterbury, and must previously have taken the degree of Doctor of Laws in one of the English universities (Burns' *Eccl. Law*, by Phillimore, tit. "Advocate"). They had the exclusive right to practise in the Ecclesiastical and Admiralty Courts. In 1857, when the Probate and Divorce Courts were created, the college was abolished, and advocates were admitted freely to all Courts; while at the same time barristers were admitted to practise in the new Courts, and after 1859 in the Admiralty Court; and now also in the Ecclesiastical Courts (Phillimore, *International Law*, vol. i., Preface; *Eccl. Law*, 2nd ed., ii. 935). See ADVOCATE.

Advow, Avow, or Avouch.—Under the feudal system, when the right of a tenant was impugned, he had to call upon his lord to come forward and defend his right. This was called advocare, voucher à garantie, to vouch or call, to warrant. The calling of the lord of the fee to defend the right of the tenant involved the admission of all the duties implied in feudal tenancy. Avower came to mean the admission by a tenant of a certain person as feudal superior, and ultimately was employed in the sense of performing the part of the vouchee or person called on to defend the right impugned. See AVOWRY.

Advowson.—*Meaning of the Word.*—An advowson is the right of presentation to a church or ecclesiastical benefice, a right known in the canon law as the *jus patronatus*.

Estates in Advowsons.—Advowsons are classed in English law as incorporeal hereditaments (Blackstone, *Com.* bk. iii. p. 21). As incorporeal hereditaments they are divided into two classes—advowsons appendant and advowsons in gross.

An advowson appendant may be defined to be a right of presentation appertaining to some corporeal hereditament, *e.g.* a manor, a castle, or the demesne lands of an earldom. Properly speaking, however, an advowson should be said to be appendant to the demesnes of the manor or earldom, or some part thereof, which are of perpetual subsistence, and not to the rents and services, which cannot support such appen-

dancy; for an advowson can only be appendant to a thing corporate. An advowson appendant passed with the grant of a manor by livery without deed and without saying *cum pertinentis*. "A church in one county may be appendant to a manor in another, or the advowson of a vicarage may be (and is of common right) appendant to a rectory or to a manor by prescription" (Mirehouse on *Advowsons*, p. 9); and advowsons may also be appendant for a part or for a turn.

An advowson in gross may be defined as an advowson belonging to a person who possesses no corporeal estate to which it is appendant, and which may therefore be defined as a right subsisting by itself, belonging to such person and not appendant to any corporeal hereditament whatever (Mirehouse on *Advowsons*, p. 12).

An advowson appendant is converted into an advowson in gross by a grant of either the appendant advowson, or of the hereditaments to which the advowson is appendant; also by a presentation to an advowson appendant as if an advowson in gross. In certain cases this disappendancy may be temporary only. To take one instance: If a lease of a manor, to which an advowson is appendant, is granted to A. for his life, and the advowson is excepted from the lease, the advowson remains in gross during A.'s life, but on his decease it again becomes appendant. (For other examples of such a temporary severance, see Phillimore, *Ecclesiastical Law*, 2nd ed., vol. i. pp. 265-267.)

But the general rule is, that when an advowson is once severed by a conveyance of the fee-simple, either of the corporeal hereditament, apart from the advowson, or of the advowson apart from the corporeal hereditament, the advowson can never afterwards be appendant.

Advowsons are also divided into presentative, collative, donative, and elective.

An advowson presentative is an advowson in which the patron has the right of presenting a person to the ordinary, to be instituted and inducted into the church.

An advowson collative is an advowson held by a bishop in right of his See. In regard to such advowsons there can necessarily be no presentation.

An advowson donative is described as a spiritual preferment in a church, chapel, or vicarage which is in the gift or disposal of the patron only, and without presentation, institution, or induction. It should be remembered that under the Benefices Act, 1898, 61 & 62 Vict., c. 48, s. 12, every benefice with cure of souls which, before January 1, 1899, was a donative, became after that date a presentative advowson. Benefices without cure of souls which may still be donative are royal chapels, royal peculiars, any cathedral or capitular preferment or dignity, any chapel belonging to any college, school, hospital, inn of court, asylum or public or charitable institution, and any private chapel (Benefices Act, 1898, s. 13 (1)).

An advowson elective is where a corporation (*e.g.* a dean and chapter) has a right to elect the person to fill the benefice.

A distinction should also be drawn between nomination and presentation. They indicate distinct rights, and may exist in different persons. Thus, generally, the owner of the legal estate has the right to present the clerk to the bishop, but the beneficial owner has the right of nominating the person to be presented.

There is a further distinction between ecclesiastical and lay advowsons.

An ecclesiastical advowson is so called, not because an ecclesiastic doth enjoy or possess it, for so he may a lay patronage, but because it belongs to one, for that he hath founded, built, or endowed the church *ex bonis ecclesiasticis*. The other kind of advowson (lay) is so called, for that it belongs to one, because he hath founded, built, or endowed some church, or erected some benefice, *ex bonis patrimonalibus* (God. *Int.* p. 34).

In the advowsons of a moiety of a church there is also a distinction drawn between *advocatio medietatis ecclesiæ* and *medietas advocationis ecclesiæ*. The former is where two patrons have a right to present a several incumbent, and such advowson is in both of the patrons alike. The latter applies to the case of parceners who, after division, have the right to present in turn. (See further as to this, PRESENTATION.)

Historical Origin of Advowsons.—The right of advowson arose, according to the old authorities, *ratione donationis, ratione fundationis, ratione fundi.*

Such a right, however, would have been incapable of existence or exercise in the first three centuries of Christianity. At that period the oblations of the faithful for the support of the Church were given to the bishop, who accounted for them to the provincial synod; and the congregation of the faithful laity took a prominent part in the election, both of bishops and presbyters, both of which customs are inconsistent with the patronage system as known to the Canonists or the English law.

The first trace of the practice, where the right to an advowson sprung, is to be found in a decretal of the Council of Orange, A.D. 448, which allowed a bishop, who had built a church in the diocese of another bishop, to nominate the clerk thereof. The 123rd Novel of Justinian (promulgated in the sixth century) decreed that "if a man should erect an oratory and desire to present a clerk thereunto by himself or his heirs, if they furnish a competency for his livelihood, and nominate to the bishop such as are worthy, they may be ordained." Advowsons and patronage, as a portion of ecclesiastical organisation, must be taken to have grown up gradually throughout Western Europe as an incident of the feudal or manorial system. It is a leading idea of the Canonists that every benefice must be presumed to possess a patron, for benefices do not come into existence naturally of themselves, but are the artificial creation of laymen, who are, for the most part, the founders of churches. The decretals lay it down that, if any man builds a church with the assent of the bishop, he acquires from the fact the right of patronage. To the question whether an advowson can be the subject of a trust, the answer seems to be that, so far as it is a form of property, it may be thus unquestionably made the subject of a trust; as for instance, the gift of an advowson to a parish (see *post*).

A modern writer, Ulrich Stutz (see *Geschichte des Kirklichen Benfizialwesen*), who is followed by Professor Maitland (see *Law Quarterly Review*, 1900, pp. 342, 343, article "The Corporation Sole"), takes the view that originally the patron was owner of the church glebe and tithes. The owner was, however, obliged by the Church to demise the church and an appurtenant glebe to an ordained priest approved by the bishop. Finally, Pope Alexander III. (1159-81) explained patronage not as a right of ownership, but as the outcome of the Church's gratitude to a pious founder. Other writers maintain that the rights of the private patron in England were merely a *prava consuetudo* (see Thomas Becket's *Honorius III.*, letter 1) that had sprung up in Norman times. A

decretal of Gregory IX., lib. iii. tit. xxxviii. cap. 16, which is in itself a rescript to the above-named Archbishop of Canterbury, declares a contract for the sale of the right of patronage to be void, "*cum inconveniens sit vendi jus patronatus, quod est spirituali annexum.*" Whatever may have been the historical origin of advowsons, English law treats them both as a form of property and also as a trust. As Cozens-Hardy, L.J., says (*re Church Patronage Trust; Laurie* v. *The Attorney-General*, [1904] 2 Ch. 604): "According to English law an advowson is regarded as property —property no doubt of a peculiar kind, to which certain ecclesiastical duties and obligations attach, and property which may be partially forfeited owing to the owner's neglect of the discharge of those duties."

Advowsons as Trusts.—In a sense the owner of an advowson is a trustee. Lyndwood and the other Canonists describe him as the advocate or protector of the Church (see also *Inst.* 17, *Arthington* v. *Coverley*, 2 App. Cas. Eq. 518), and although he has no estate in the freehold of the benefice he may obtain an injunction against the person committing waste (*Hoskins* v. *Featherstone*, 1789, 2 Bro. C. C. 552; 29 E. R. 302; *Ross* v. *Adcock*, 1868, L. R. 3 C. P. 655, and cases therein cited; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552). Indeed, there is no question but that on its strictly ecclesiastical side, so far as an advowson implies the ecclesiastical duty of presenting a clerk to a living, the owner is bound to act as a trustee. This brings us to the question whether a trust may be created of advowsons, a question which has lately been a good deal considered by the Courts. That an advowson, so far as it is civil property, may be the subject of a trust is unquestionable. Thus the gift of an advowson to a parish is a good charitable trust (*Attorney-General* v. *Scott*, 1749, 1 Ves. Sen. 413; 27 E. R. 1113; *re St. Stephen's, Coleman Street*, 1888, 39 Ch. D. 492). The reason for this is that the advowson may be sold for the benefit of the parish. Whether, however, a trust for the purchase of advowsons, with a view of presenting the holders of certain distinctive views, or clerics of a certain character, to them, would constitute a good charity, is a doubtful question (*In re Hunter; Hood* v. *Attorney-General*, [1897] 1 Ch. 518; 2 Ch. 105; [1899] A. C. 309). In that case a testator gave part of his residuary estate, as could be given for charitable purposes, to trustees for investment, "and that they may apply the income or any portion of the capital in grants for or towards the purchase of advowsons or presentations." The testator gave other parts of his residuary estate for the erection or endowment of churches, chapels, or schools, and in paying or contributing to the salaries of rectors and teachers on certain conditions, which showed that the testator desired only to "benefit clergymen and teachers who supported true Protestant and Church of England principles." Romer, J., considered that "there was nothing in the will to show that advowsons, when purchased, were to be held on any trust, that a mere trust to purchase advowsons was not a charitable trust, and that if a trust to present Evangelical clergymen could be implied, it would not be a good charitable trust." The Court of Appeal (Lindley, Rigby, Lopes, L.JJ.) held that the will showed an intention to advance Evangelical views, that for the trustees to purchase an advowson and present to it a clergyman not holding Evangelical views would be a breach of trust, and that though the conditions did not fit purchased advowsons, the intention applied to it, and that advowsons purchased would be subject to a charitable trust. The House of Lords reversed the judgment of the

Court of Appeal, but on the ground that no trust, charitable or otherwise, which the Court could execute was annexed to the "advowsons to be purchased." Their Lordships, at the same time, did not directly dissent from the view that a gift of money for the purpose of buying an advowson for the advancement of a particular school of religious thought was good. *Re Hunter* was considered in the case *re The Church Patronage Trust; Laurie* v. *Attorney-General*, [1904] 1 Ch. 4; 2 Ch. 643. Here the owner of an advowson transferred it to trustees "upon trust, from time to time, as a vacancy occurred, to appoint to the living a fit person of godly life and conversation; and the trust deed provided that three at least of the full number of trustees should be clergymen of the Church of England, and that only those should be eligible as trustees who should be of godly life and conversation, and should profess themselves members of the Established Church, and should be known to be zealously attached to the Reformed Faith contained in the Liturgy and Articles of the Established Church." The Court of Appeal (Vaughan Williams, Cozens-Hardy, Romer, L.JJ.) held, confirming Buckley, J., that this was not a charitable trust, inasmuch as the deed contained no *cestui-que trust*, and merely provided for the due performance of the duty cast by law upon every legal owner of an advowson, to appoint a fit and duly qualified person to the living. In giving this judgment, Vaughan Williams, L.J., expressed the view that the House of Lords in *re Hunter* had not approved the portion of the judgment of the Court of Appeal that sanctioned a limitation of field of selection of the persons to be presented according to theological views as a good charitable trust; and Cozens-Hardy, L.J., stated that nothing in *re Hunter* would prevent the Court of Appeal from deciding the point when it arose.

It is, of course, obvious that if a trust of this nature cannot be supported as a good charitable trust, it would be bad as a perpetuity. (See Lewis on *Perpetuities*, p. 695).

It may be added that a trust somewhat of this character was declared illegal by the Court of Exchequer in 1633, and its advowsons placed at the king's disposal (*Exchequer Decrees*, series 4, iv. 88; Gardiner's *History of England*, 1603-1642, p. 259).

Ever since the time of Henry II. the civil, as distinguished from the ecclesiastical Courts, have decided suits relating to advowsons. At common law no Statute of Limitations applied to the recovery of advowsons.

A limit is now fixed by 3 & 4 Will. IV. c. 27, s. 30, namely, the period during which the clerks in succession shall obtain and hold possession adversely (see ADVERSE POSSESSION) to such right of presentation; if such incumbencies together amount to sixty years, or after such times as with the time of such incumbencies will make up sixty years.

By sec. 4, if the right of bringing an action is barred under this Act, the right of the person claiming is extinguished.

An advowson in gross, as a form of property more beneficial to the grantee, is more favoured by the law than an advowson appendant; and in a case where the grant could be construed as an advowson in gross or an advowson appendant, it was construed as an advowson in gross (33 Hen. 8; Dyer, 40).

A person may be tenant in fee-simple of an advowson, as well as of a piece of land, in which case he and his heirs have a perpetual

right of presentation. An advowson will descend to the heir on an intestacy.

As to persons under disability, see 13 Edw. I. c. 5; 7 Anne, c. 18.

An advowson may also be limited to a person for a life, or lives, or years, in possession, remainder, or reversion. And it may be held in joint-tenancy, in coparcenary, or in tenancy in common. A husband will be tenant by the curtesy of an advowson, though the church be not void during the coverture. When a widow is endowed of a manor to which an advowson is appendant, she is entitled to it. A widow is also dowable of an advowson in gross, and entitled to the third presentation. An advowson in gross may (subject to the provisions of the Benefices Act, 1898) be transferred by every species of conveyance applicable to the transfer of incorporeal real hereditaments, according to the nature of the proprietor's estate in the advowson; and an advowson appendant, by every conveyance by which the corporeal hereditaments to which it is appendant can be transferred (but as to collative advowsons, see *post*).

An advowson appendant will pass with the manor without any express words, *e.g. cum pertinentis*, except in the case of the king. An advowson will not pass by the word "land," but it will by "hereditaments" or "church"; and the Act 1 Vict. c. 26, s. 1, provides that the words real estate shall include advowsons. In the case of the king, by the Statute *Praerogativa Regis* it will not pass "when he giveth or granteth" (*secus*, when he restoreth) land or a manor, "unless he make express mention in his deed or writing," *e.g.* that is, when he nameth the advowson, or useth such expressions as "with the appurtenances," or "as fully and perfectly." Advowsons in gross were held to pass under a devise of "all other my real estate in the county of L." (*In re Hodgson; Taylor* v. *Hodgson*, [1898] 2 Ch. 545).

An advowson may be the subject of a mortgage, but a mortgagee must present the nominee of the mortgagor (see PRESENTATION).

An advowson in gross will, in the case of an intestacy, descend to the heir, but if, in the case of a presentative advowson, the church has become vacant in the life of the testator, the right of presentation is in the executor. An advowson in the hands of an executor is assets (see *John London* v. *The Chapter of Southwell*, 1619, Holt, 350); but if the patron grants the next avoidance of a church to a testator who dies before presenting, and after his death his executor presents, and has the benefit of preferring his son or friend, yet this shall make no assets in his hands, because he could not lawfully take money to present. But if a stranger presents and gets his clerk admitted, and the executor recover damages in an action by way of what was of old a *quare impedit*, the money so recovered will be assets. If the testator has died before the church becomes void, the executor will be charged with the value as assets if he has neglected a proper opportunity to make a sale (Williams on *Executors*, 10th ed., p. 1293). It should be noted that the void turn of a donative descends to the heir, and also of a presentative advowson, if the owner of the advowson is also incumbent of the church (see PRESENTATION).

The devise of an advowson is good even if made by the incumbent of a church, the inheritance of the advowson being in him, and he may nominate the person to be appointed by his executors.

Lord Coke (1 *Inst.* 374 (*b*)) said that an advowson is assets to satisfy a warranty, but that an advowson in gross is not extendible upon a writ

of elegit, because no annual value can be set upon it. An advowson appendant to a manor is clearly real assets to satisfy debts, because, the manor being assets, what is appendant must be assets likewise (*Westfaling* v. *Westfaling*, 1747, 3 Atk. 464; 26 E. R. 1066). And it has also been held by the House of Lords that an advowson in gross, whether the interest of the proprietor be legal or equitable (see ASSETS), is assets for the payment of debts, and will be sold by the Court for that purpose (*Robinson* v. *Tonge*, 1730, 1 Bro. P. C. 114; 1 E. R. 453; *Kinaston* v. *Clark*, 1741-2, *ibid.*, at 206). And under the Bankruptcy Act, 1883, s. 44, subs. 11, an advowson or right of next presentation to a benefice will vest in the trustee in bankruptcy, and may be sold by him in the ordinary way. But if the benefice is vacant, he cannot sell the right of presentation, nor can he present to the vacant benefice. The right of presentation will remain with the bankrupt.

By 1 Eliz. c. 19, and 13 Eliz. c. 19, ecclesiastical persons seised of advowsons in right of the churches, and masters and fellows of colleges, and guardians of hospitals seised in right of their houses, are restrained from making any grants but of things corporeal, and therefore cannot make grants of advowsons; such grants, if made, have been held good, but only as against themselves (*Armiger* v. *Bishop of Norwich*, 1599, Cro. (1), 690; and *Rennell* v. *Bishop of Lincoln*, 1827, 7 Barn. & Cress. 74; 36 R. R. 139); but such alienations are not now favoured by the Courts (*Ecclesiastical Commissioners* v. *Wodehouse*, *supra*). By 13 Anne, c. 11, it is enacted that if any person purchase the next avoidance to any benefice with cure of souls or living ecclesiastical, and shall be presented or collated thereupon, such presentation or collation shall be void, and it shall be lawful for the Queen, her heirs and successors, to present or collate unto such benefice or living for that one turn or time only.

The Benefices Act, 1898, 61 & 62 Vict. c. 48, besides abolishing donatives, makes certain alterations in the law in respect to advowsons. It makes it impossible in future to deal with rights of presentations separately from the advowson, except when the owner of the presentation is not the owner of the advowson.

By sec. 1, transfers of the rights of patronage to be valid must be registered in the diocesan registry within a month, or such extended time as the bishop allows under special circumstances. The whole interest of the transferror must be transferred; and more than twelve months must have elapsed since the last institution or admission to the benefice. (Transfer here does not include a transmission on marriage, death, or bankruptcy, or otherwise by the operation of law, or a transfer on the appointment of a new trustee when no beneficial interest passes. Nor does the Act prevent the limitation in a settlement of a life interest to the settlor, or in a mortgage the right of redemption.)

No right of patronage may be sold by public auction, unless in conjunction with a manor or an estate in land of not less than 100 acres situate in the same or an adjoining parish, and belonging to the same owner; and the person offering such right for sale by auction or bidding at the auction is liable to a fine of £100 on summary conviction. Agreements for the right of transfer in favour or on the nomination of a particular person, and any agreement on the transfer of a right of patronage of a benefice for the retransfer of the right, for postponing

payment of any part of the consideration, or for payment of interest, until a vacancy, or for more than three months, for any payment in respect of the date at which a vacancy occurs, or for the resignation of a benefice in favour of any person, are invalid. (As to the remaining provisions of this Act, see articles PRESENTATION; SIMONY.)

Exchange of Advowsons.—Several modern Acts have been passed on the subject of the exchange of advowsons, namely, 3 & 4 Vict. c. 113; 4 & 5 Vict. c. 39; 16 & 17 Vict. c. 50; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114; and 33 & 34 Vict. c. 39. The object of these Acts is to enable bishops and other patrons, with the consent of the Ecclesiastical Commissioners, by exchange of advowsons or other alteration in the exercise of patronage, to secure the better performance of spiritual duties in ill-endowed parishes, and other kindred purposes. Where a private Act authorised the sale of glebe lands with the consent of the patron of the living, or his guardian in case of infancy, and an infant was tenant-in-tail of the advowson, and the right of presentation was vested in the trustees of the settlement, it was held that the guardians of the infant, and not the trustees, were the persons to give consent. (*Leigh* v. *Leigh*, [1902] 1 Ch. 400.)

(For questions relating to presentation, collation, induction, or admission, see PRESENTATION.)

See also INCORPOREAL HEREDITAMENT; ENTRY ON BENEFICE; PATRON; JUS PATRONATUS; INCUMBENT; GLEBE.

[*Authorities.*—Lindwood, *Prov.*; Gibs. *Cod.*; Godolphin, *Rep. Can.*; Van Espen, *Jus Canonicum*; Coke's *Institutes*; Coke on *Littleton*; Bingham, *Antiquities of the Christian Church*; Black. *Com.*; Maitland, *Canon Law in the Church of England*; Maitland, "The Corporation Sole," *Law Quarterly Review*, 1900; Mirehouse, *Advowsons*; Cruise, *Digest*; Phillimore, *Ecclesiastical Law*, 2nd ed.; Cripps, *Law of the Church and Clergy*; Hardy, *The Benefices Act.*]

PRECEDENTS.

I. *AGREEMENT for the* SALE *of the Right of Patronage of an* ADVOWSON, *in fee for Life or for Years.*

ARTICLES OF AGREEMENT, made the day of

Parties. BETWEEN A. B., of &c. (hereinafter referred to as the vendor), of the one part, and C. D., of &c. (hereinafter referred to as the purchaser), of the other part.

Agreement for sale and purchase. 1. The vendor agrees to sell, and the purchaser agrees to purchase, ALL THAT the advowson, and perpetual right of patronage

Parcels. and presentation of, and to the rectory and parish church of

ADVOWSON. , in the county of , and in the diocese of , and of the fee-simple and inheritance thereof,[1] free from incumbrances, at or for the price or sum of £ .

[1] If for life, say,
"for the natural life of the said [*purchaser*] (*or* [*nominee*], of &c.)."
If for lives, say,
"for the lives and life of [*nominees*], of &c., and the survivors and survivor of them."

To deliver abstract.

2. The vendor will deliver unto the purchaser, within days from the date hereof, an abstract of the title of the said vendor to the said advowson, such abstract to commence with, &c., and also extracts certified by the registrar of the Bishop of , of all the successive presentations to the said rectory since the day of 17 , [*the commencement of title*]. All recitals, statements and descriptions contained in any document dated twenty years or upwards before the date of this agreement shall be conclusive evidence of the facts and matters therein recited, stated, or described or thereby implied respectively.

3. The purchaser shall make in writing and deliver to the solicitor of the vendor his objections and requisitions (if any) to the title shown by the abstract within days after delivery thereof; and all objections and requisitions which shall not be made and sent as aforesaid within the time specified shall be deemed to have been waived [and for this purpose time shall be of the essence of the contract].

4. In case the purchaser shall make any objection to or requisition on the title, which the vendor shall from any cause, or on any grounds whatever, be unable or unwilling to answer or comply with, the vendor shall be at liberty (notwithstanding any attempt to answer or comply with such objection or requisition, or any previous or pending negotiation or litigation) at any time to rescind the sale. In that event the vendor shall return the deposit, but the purchaser shall not be entitled to any interest, costs, or compensation, or other payment whatsoever.

Completion of purchase.

5. The purchaser shall, on the day of , pay the purchase-money at the office of Messrs. , the vendors' solicitors, at , and the purchase shall then and there be completed. On payment of the purchase-money as aforesaid, the vendor and all other necessary parties shall convey and assure the said advowson, with the appurtenances, unto the purchaser,[1] or as he shall direct. The conveyance or assurance shall be prepared by and at the expense of the purchaser, and shall be left not less than days before the said day of for the approval of the said solicitors of the vendor.

Delivery of attested copies of title-deeds, and acknowledgment of right to originals.(2)

6. The vendor shall, on the execution of the said conveyance, at his own charges, deliver unto the purchaser true and attested copies of all deeds, evidences, and writings, concerning the said advowson; And in the said conveyance enter into the usual acknowledgment of the right of the purchaser to the production of

If for years, say,
"for the term of years from the date hereof."
If for years determinable on lives, say,
"for the term of years from the date hereof, if the said [*purchaser*] (*or* [*nominee*], of &c.), should so long live."

FOR LIFE OR LIVES. FOR YEARS.

[1] "for his life (*or* unto the said [*purchaser*], his heirs and assigns, for the life of the said [*nominee*],) (*or* for the lives and life of the said [*nominees*], and the survivors or survivor of them), (*or* unto the said [*purchaser*], for the said term of years, determinable as aforesaid)."

[2] This clause will be used where the deeds relate to other property of greater value than the advowson, or where for any other reason they are retained by the vendor.

the originals, and undertaking for their safe custody, and to permit the said purchaser to have any fresh copies thereof respectively from time to time, at his own expense.

In case of incumbent's death before conveyance, purchaser to nominate next incumbent.

7. In case of the decease, cession, deprivation, or relinquishment of the present incumbent of the said advowson, before the said day of , the vendor shall duly present such person to the said advowson, as the purchaser shall nominate; but if the presentation to the said advowson should devolve on the Crown, in consequence of the present or any succeeding incumbent being promoted to a bishopric [either] before [or after] the said day of , this contract shall not be affected thereby, nor shall the said purchaser be entitled to any deduction out of the said purchase-money.

If incumbent be made a bishop, contract not to be affected.

IN WITNESS, &c.

II. *AGREEMENT for the Sale of the* NEXT PRESENTATION *to a Parsonage.*

ARTICLES OF AGREEMENT made this day of ,

Parties.

BETWEEN [*vendor*], of &c. (hereinafter referred to as the vendor), of the one part, and [*purchaser*], of &c. (hereinafter referred to as the purchaser), of the other part.

Agreement to sell.

1. The vendor agrees to sell, and the purchaser agrees to purchase, for the sum of £ , the next presentation of and to the rectory and parish church of , in the county of , and the diocese of .

To deliver abstract.

2. The vendor will deliver to the purchaser, within days after the date hereof, an abstract of the title of the said vendor, to grant the next presentation of and to the said rectory and parish church [*continue, ut ante, p.* 235].

3. The purchaser shall make in writing and deliver to the solicitor of the vendor his objections and requisitions (if any) to the title shown by the abstract within days after delivery thereof; and all objections and requisitions which shall not be made and sent as aforesaid within the time specified shall be deemed to have been waived [and for this purpose time shall be of the essence of the contract].

4. In case the purchaser shall make any objection to or requisition on the title, which the vendor shall from any cause, or on any grounds whatever, be unable or unwilling to answer or comply with, the vendor shall be at liberty (notwithstanding any attempt to answer or comply with such objection or requisition, or any previous or pending negotiation or litigation) at any time to rescind the sale. In that event the vendor shall return the deposit, but the purchaser shall not be entitled to any interest, costs, or compensation, or other payment whatsoever.

To execute conveyance at purchaser's expense.

5. [*Completion of purchase, ut ante, p.* 235; *and continue.*] On payment as aforesaid of the said sum of £ , the vendor, and all other necessary parties, if any, shall execute a proper

assurance of the next presentation to the said rectory and parish church unto the purchaser, or as he shall direct. The assurance shall be prepared by and at the expense of the purchaser, and shall be left not less than days before the said day of , for the approval of the solicitors of the vendor, at their said office.

To deliver attested copies; and covenant to produce deed.

6. The vendor shall, at his own charges, on the execution of the said conveyance, deliver to the purchaser true and attested copies of the several title-deeds, &c. [*ut ante, p.* 235].

If present or succeeding incumbent be made a bishop, purchaser to have the next presentation.

7. If the present or any succeeding incumbent of the said rectory should at any time hereafter during his incumbency of the said rectory be created a bishop, whereby the right of presentation to the same rectory may devolve to the Crown, then the said [*purchaser*] shall have the first or next turn or right of presentation to the said rectory after the Crown.

IN WITNESS, &c.

III. *CONTRACT for* SALE, *by a* TENANT IN TAIL, IN REMAINDER, *of the* NEXT PRESENTATION *to a* RECTORY *in the event of the Tenant in Tail being entitled in possession on its falling vacant; with* COVENANT *to* REFUND *the* PURCHASE-MONEY, *in the event of the Tenant in Tail not so becoming entitled*, &c.

ARTICLES OF AGREEMENT made the day of

Parties.

, 18 , BETWEEN [*tenant in tail*], of the one part, and [*purchaser*], of the other part.

Recital of title to advowson as tenant in tail in remainder.

WHEREAS the said [*tenant in tail*] is entitled in tail male general to the advowson or right of patronage and presentation of and to the rectory and parish church of , in the county of , and in the diocese of , with the appurtenances, in remainder, expectant on the decease of [*tenant for life*]; AND WHEREAS the Rev. [*incumbent*] is the present incumbent of the said rectory and parish church of , and is now of the age of years or thereabouts.

Age of incumbent.

NOW THESE PRESENTS WITNESS, that in consideration of the sum of £ by the said [*purchaser*] to the said [*tenant in tail*], paid at or before the execution of these presents, the receipt of which sum of £ he, the said [*tenant in tail*], doth hereby acknowledge, HE, the said [*tenant in tail*], hereby covenants and agrees with the said [*purchaser*], in manner following, that is to say:—

Agreement to sell next presentation in case it falls vacant while vendor's estate is in possession.

1. In the event of the death of the said [*tenant for life*], in the lifetime of the said [*tenant in tail*], and also by death, resignation, cession, deprivation, avoidance, or otherwise of the said rectory and parish church of , in the lifetime of him the said [*tenant in tail*], and after the decease of the said [*tenant for life*], he the said [*tenant in tail*] will sell and assure unto, and at the expense of the said [*purchaser*], the now first and next presentation to the said rectory and parish church of , with the

appurtenances, for all the now first and next vacation or avoidance of the same.

Purchaser may present one of his sons or a stranger, in trust to resign in favour of one of purchaser's sons, when he shall become competent.

2. It shall be lawful for the said [*purchaser*], his executors, administrators, or assigns, in the event of the decease of the said [*tenant for life*], in the lifetime of the said [*tenant in tail*], and also of such avoidance as aforesaid of the said rectory in the lifetime of the said [*tenant in tail*], and after the decease of the said [*tenant for life*], by virtue of these presents, and of the conveyance to be made pursuant thereto, to present to the said rectory, and to the diocesan of the same, or any person competent in that behalf, when the church shall, by death, resignation, privation, cession, or other means first and next after the date of these presents, happen to be void, any son of him, the said [*purchaser*], who, in the happening of the events, may then be in holy orders, and capable of taking and holding the same; and if the said [*purchaser*] shall not then have any such son, who shall so then be in holy orders, and capable of taking and holding as aforesaid, then some other fit and proper person, who shall then be in holy orders, and so capable of taking and holding as aforesaid, on a bond of resignation by such person to vacate the living of the said rectory and parish church in favour of one of two sons of him the said [*purchaser*], in such bond to be specially named and described, who shall thereafter take holy orders, and be capable of holding the same living.

Vendor to deliver abstract;

3. The said [*tenant in tail*] will, at his own expense, make and deliver unto the said [*purchaser*], or his solicitor, an abstract of the title of him the said [*tenant in tail*] to the said advowson, right of patronage, and presentation of and to the said rectory. In case the

to refund purchase-money, if the next avoidance does not fall in his time.

decease of the said [*tenant for life*] shall not happen in the lifetime of the said [*tenant in tail*], or in case no such avoidance as aforesaid of the said rectory shall happen in the lifetime of the said [*tenant in tail*], or if such avoidance shall happen in the lifetime of the said [*tenant for life*], or if the said [*tenant for life*] in exercise of his statutory powers in that behalf shall sell the advowson or the next presentation to the said rectory, then and in either of such cases he the said [*tenant in tail*], his heirs, executors, or administrators, shall, within the space of six months next after the decease of the said [*tenant for life*], refund and pay unto the said [*purchaser*], his executors, administrators, and assigns, his said consideration money, or sum of £ , together with interest for the same from the day of the date of these presents, at the rate of £ per centum per annum, without deduction.

IN WITNESS, &c.

IV. *GRANT of an* ADVOWSON, *in* CONSIDERATION *of the Purchaser paying the same* ANNUITY *as the* VENDOR *had* COVENANTED *to* PAY *when he purchased it; with a* COVENANT *by the* PURCHASER *to* PAY *the* ANNUITY *and* INDEMNIFY. (*Variation where Purchaser gives a* BOND OF INDEMNITY.)

THIS INDENTURE, made the day of , BETWEEN
Parties. [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the
Recitals: other part: WHEREAS, by an indenture bearing date on or about
of grant to vendor; the day of , and made between [A. B.], of the one part, and the said [*vendor*], of the other part, in consideration of the bond of the said [*vendor*], bearing even date with the indenture now in recital, in the penalty of £ , conditioned for the payment unto the said [A. B.] and his assigns, for his life, of an annuity of £ , clear of all deductions, at the times and in manner therein mentioned; (and which bond, and the annuity thereby secured, are expressed to be in full for the absolute purchase of the advowson and hereditaments therein and hereinafter mentioned, and of the fee-simple and inheritance thereof, with the appurtenances, free from incumbrances), All that the advowson and perpetual right of patronage and presentation of and to the rectory or parish church of [R.], in the county of , with all and every the rights, members, and appurtenances whatsoever to the same belonging or in anywise appertaining, were assured to the use of the
of annuitant having changed his name; said [*vendor*], his heirs and assigns, free from incumbrances: AND WHEREAS the said [A. B.] afterwards obtained Her Majesty's licence and consent to use the surname and bear the arms of [C.],
of agreement to purchase. instead of the surname and arms of [B.]: AND WHEREAS the said [*vendor*] has agreed to assure the said advowson and hereditaments unto the said [*purchaser*], his heirs and assigns, in manner hereinafter appearing, in consideration of the[1] covenant hereinafter contained on the part of the said [*purchaser*] for payment of the said annuity of £ , so secured to the said [A. C.] during his life as aforesaid, and for the indemnity of the said [*vendor*], as
Testatum. herein mentioned: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the[2] covenant hereinafter contained on the part of the said
Grant. [*purchaser*], his heirs, executors, and administrators, for payment of the aforesaid annuity of £ , and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, the said [*vendor*] hereby grants, and, as beneficial owner, conveys unto the said [*purchaser*], his heirs and assigns, ALL THAT the advowson and

[1] If the purchaser gives a bond for payment of the annuity the subsequent part of the recital will be varied thus:—
Variation where the purchaser gives a bond of indemnity. "bond of the said [*purchaser*] hereinafter referred to, conditioned for the payment," &c.

[2] "bond of the said [*purchaser*], bearing even date with these presents, in the penalty of £ , conditioned for the payment of the aforesaid annuity, and for the indemnity of the said [*vendor*], his heirs, executors, and administrators, therefrom, in the manner in the condition of the said bond expressed," &c.

Parcels. perpetual right of patronage and presentation of and to the rectory or parish church of [R.], in the said county of : To HOLD Advowson. the said advowson, hereditaments, and premises, UNTO AND TO THE *Habendum.* USE of the said [*purchaser*], his heirs and assigns. AND THIS Further *testatum.* INDENTURE FURTHER WITNESSETH,[1] that, in consideration of the grant hereinbefore made of the said advowson and Covenant by purchaser to pay the annuity; premises, the said [*purchaser*] hereby covenants with the said [*vendor*], that he the said [*purchaser*], his heirs, executors, or administrators, will henceforth, during the life of the said [A. C.], pay unto the said [A. C.] and his assigns, the said annuity or yearly sum of £ , secured to him and them by the bond hereinbefore mentioned or referred to, dated the day of , when and as the same annuity shall henceforth become and indemnify vendor. due and payable; And also will, at all times hereafter, keep indemnified the said [*vendor*], his heirs, executors, and administrators, from and against all actions, proceedings, costs, charges, expenses, claims, and demands, by reason or on account of the non-payment of the said annuity or yearly sum of £ , by the said [*purchaser*], his heirs, executors, or administrators, pursuant to the covenant of the said [*purchaser*] hereinbefore contained.

IN WITNESS, &c.

V. *GRANT of the* NEXT PRESENTATION *to a* RECTORY *in* CONSIDERATION *of a* GROSS SUM.

THIS INDENTURE,[2] made the day of , BETWEEN Parties. [*vendor*], of &c., of the one part, and [*purchaser*], of &c., of the Recitals: other part: WHEREAS the said [*vendor*] is seised of the perpetual of seisin; advowson, right of patronage and presentation of and to the rectory or parish church of , and the inheritance thereof in fee-simple, free from incumbrances, of which rectory or parsonage the of contract. Reverend [A. B.] is the present incumbent: AND WHEREAS the said [*vendor*] has agreed to sell to the said [*purchaser*], his executors, administrators, and assigns, the next turn or presentation to the said rectory or parsonage, when the same shall first and next happen to become vacant, for the sum of £ : NOW THIS *Testatum.* INDENTURE WITNESSETH, that in pursuance of the said Considera-tion. contract, and in consideration of the sum of £ , now paid by the said [*purchaser*] to the said [*vendor*], of which sum the said [*vendor*] hereby acknowledges the receipt, he the said [*vendor*] Grant. hereby grants, and as beneficial owner conveys unto the said Parcels. [*purchaser*], his executors, administrators, and assigns,[3] ALL THAT

[1] If a bond is given by the purchaser, of course this *testatum* clause will be omitted. The convenience attending a bond is that it is delivered to the obligee, whereas the covenant, being contained in the grant, passes into the hands of the covenantor.

Stamp. [2] This deed of course will bear an *ad valorem* stamp, as in the instance of the transfer of any other species of property.

[3] A next presentation, when sold apart from the advowson, is personal property: *Bennett* v. *Bishop of Lincoln*, L. R. 10 C. P. 518.

Next presentation.

the first and next nomination and turn or right of presentation, of and to the rectory and parish church of aforesaid, which shall happen or arise upon or in consequence of the vacancy or avoidance of such rectory or living, by death, resignation, cession, or deprivation, or by whatsoever other ways or means the said church shall first or next happen to be void; TO HOLD the premises UNTO the said [*purchaser*], his executors, administrators, and assigns [*acknowledgment and undertaking by vendor as to muniments of title*].

IN WITNESS, &c.

Affeerors.—Officers appointed by the steward of the Court of a manor or hundred to assess the amerciaments (*q.v.*) imposed by it. There were usually two appointed, but occasionally four. The form of the oath which they took before acting is given in Kitchen, *La Court Lecte*, ed. 1623, p. 46*a*. It seems that they were sometimes called *taxatores*, and it is probable that they were frequently called upon to assess not only amerciaments, but also the damages in plaints brought in inferior Courts.

Affidavit.—See OATH; OATHS.

Affiliation.—The legal process whereby the father of a bastard child [see BASTARD], upon the paternity being proved against him, may be ordered to make contributions towards its maintenance and education, so that such child may not become chargeable to the ratepayers.

General Outline of the Law.—Any single woman (who, for the purposes of the bastardy law, can be a married woman living apart from her husband), either being with child or having given birth to a bastard child, may apply to a justice for a summons against the man alleged by her to be the father; the application may be made before the birth, and then ought to be in writing and upon oath, but the hearing of the summons must not take place until after the birth; the application, if the child has been born, need not be written nor upon oath, but must be made within twelve months after the birth, when the man has continued to reside in England during the whole of that time; if, however, proof can be given upon the application that he has, within the twelve months after the birth, paid money for the child's maintenance, in such case the application may be made at any time after the expiration of the twelve months; if the man has ceased to reside in England at any time within the twelve months, the application may be made within the twelve months next after his return (8 & 9 Vict. c. 10, s. 4; 35 & 36 Vict. c. 65, s. 3). By sec. 4 of 35 & 36 Vict. c. 65, at the hearing the justices, or in the metropolis (8 & 9 Vict. c. 10, s. 9) a single magistrate, after taking the evidence of the woman, and any other evidence adduced on her behalf, and the evidence of the man and any witnesses on his behalf, may, if the evidence of the woman is corroborated in some material particular, adjudge the man to be the putative father, and make an order against him to pay the expenses incidental to the child's birth, and also the funeral expenses of the child, provided it has died before the making of such order, or (if it

has lived) to contribute to its maintenance and education not more than five shillings a week for any period until (35 & 36 Vict. c. 65, s. 5) the child shall have attained the age of thirteen or (if the Court see fit) sixteen; if the application be made before the child's birth, or within two calendar months after, such weekly sum may, in the discretion of the Court, be calculated from the birth of the child, and the order may also give the applicant the costs incurred in obtaining the order (s. 4). Such order may, at any time after the expiration of one calendar month from its being made, be enforced, in default of payment, by warrant and distress, and, failing distress, the man may be committed to prison (8 & 9 Vict. c. 10, s. 8; 35 & 36 Vict. c. 65, s. 4; as modified by 42 & 43 Vict. c. 49, ss. 53 and 54). If the summons is dismissed the man can obtain no order for costs. Even though the dismissal be on the merits, the decision is so far from being *res judicata* that the woman may obtain a re-hearing. But she has no appeal to Quarter Sessions. An appeal to Quarter Sessions is given to the man (7 & 8 Vict. c. 101, s. 4). The appeal is in the nature of a re-hearing, and the woman must be corroborated (8 & 9 Vict. c. 10, s. 6); Quarter Sessions may allow or dismiss the appeal, or (35 & 36 Vict. c. 65, s. 9) reduce the amount; the Court may give the successful party the costs of the appeal; the result of such appeal is a final determination of the matter, unless the appeal was allowed through the absence, owing to a mistake, of the woman. The alleged father may also avail himself of *certiorari*, if there is a legal defect on the face of the order, or if want of jurisdiction can be shown. Or a case may be stated under 20 & 21 Vict. c. 43, ss. 1 and 3, and 42 & 43 Vict. c. 49 (the Summary Jurisdiction Act, 1879), s. 33. The money ordered to be paid is payable to the mother, but provision is made by 7 & 8 Vict. c. 101, s. 5, for the appointment of somebody to have the custody of the child, in the event of the death of the mother, or of her being, from various causes, prevented from having charge of her child, and to receive the money, so long as the child does not become chargeable to any parish or union. Where the child does under any such circumstances of death, or incapacity of the mother, become so chargeable by neglect of the putative father to pay, the guardians are empowered to enforce the order by all such means as would have been available to the mother (7 & 8 Vict. c. 101, s. 7). Where a bastard, in respect of whom there is no order in existence, becomes chargeable, the guardians may obtain a summons against the man alleged to be the father; the mode of proof and the procedure, and the method of enforcing the order, are the same as in a case where the mother is the applicant, with the same right of appeal for the putative father (36 Vict. c. 9, s. 5). The main difference between a proceeding instituted by the guardians and a proceeding by the mother consists in the right of the guardians to make such application at any time, even after the expiration of the limit of time imposed upon the mother, and notwithstanding that the mother has married and that her husband has sufficient means to support the child. Any order so obtained by guardians only holds good while the child is actually in receipt of relief. There are special provisions in the Army Act, 1881 (44 & 45 Vict. c. 58, s. 145) for the enforcement of orders in bastardy against soldiers of the regular forces; there is no such legislation in respect of sailors. The Clergy Discipline Act, 1892, 55 & 56 Vict. c. 32, s. 1, enacts that the preferment of a clergyman, upon whom a bastardy order is made, shall become

vacant, in consequence of such order, within twenty-one days after such order becomes conclusive, *i.e.* is not appealed against, or, upon appeal, is confirmed. A putative father may be indicted for the misdemeanor of wilfully disobeying a bastardy order.

The scope of proceedings in affiliation is the bringing home to the father of a bastard the pecuniary liability arising from its birth, in order that the child may not become chargeable to the parish, and the provisions of the various Bastardy Acts are directed mainly to the effecting of that end. A bastardy proceeding is in the nature of a civil process (*R.* v. *Berry*, 1859, 8 Cox C. C. 121); but after an order has once been made, the means of enforcing it are of a highly penal character, and indeed, according to a *dictum* of Grove, J., are in the nature of "a criminal case" (see *Davies* v. *Evans*, 51 L. J. M. C. 136). The determination of a bastardy proceeding constitutes no *res judicata* except between the parties thereto. A decision, for example, of Quarter Sessions quashing a bastardy order upon the merits can be no bar to an action for seduction (*Anderson* v. *Collinson*, [1901] 2 K. B. 107; 70 L. J. K. B. 620; 84 L. T. 465; 49 W. R. 623; 17 T. L. R. 425). Nor is a bastardy order in the nature of a Scotch declarator of bastardy, and the result of a proceeding in bastardy can afford no material for a plea of *res judicata* to any petition under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93). See LEGITIMACY.

The Statutes.—The present statute law is comprised in several Acts of Parliament which extended only to England and Wales, until 44 & 45 Vict. c. 24 was passed (see No. 10, *inf.*). The still effective sections are here enumerated.

1. 4 *&* 5 *Will. IV. c.* 76 (*The Poor Law Amendment Act*, 1834), by sec. 57 makes a husband liable to maintain his wife's illegitimate child born before marriage until the child is sixteen, or (if a female) marries; sec. 71 makes the settlement of the mother the settlement of her bastard child under the age of sixteen, unless the child acquires a settlement in its own right, and makes the mother, while she remains single, liable to maintain such child until it is sixteen, or (if a female) marries under that age.

2. 7 *&* 8 *Vict. c.* 101 (*The Poor Law Amendment Act*, 1844) established the system now in force, though considerable alterations and additions have been made since. Sec. 1 abolished the then existing system; sec. 4 gives the justices power to adjourn from time to time the hearing of a bastardy case, provides that the order must be applied for within forty days from the service of the summons on the alleged father, and gives the putative father the right to appeal to Quarter Sessions; sec. 5 provides that all money payable under a bastardy order shall be due and payable to the mother so long as she lives and is of sound mind, and is not in any gaol or prison; if she dies or becomes of unsound mind, or is in any gaol or prison, some person may be appointed by two justices to have the custody of the bastard child so long as the child is not chargeable to any parish or union; sec. 6 provides for the punishment of any woman who, having the means of maintaining her bastard child, neglects to do so; sec. 7 provides for proceedings to be taken, after the mother's death or if she be incapacitated as aforesaid (*i.e.* in sec. 5), by the guardians, or if there are no guardians, by the overseers, to enforce the order against the father so often as the child becomes chargeable to any union or parish; on the order being enforced,

the money is to be made payable to somebody appointed as under sec. 5, on condition that the child ceases to be chargeable; sec. 8 makes it a misdemeanor for any officer of a union, parish, or place, to endeavour to bring about a marriage by threat or promise in respect of bastardy proceedings; sec. 8 further makes it an offence punishable summarily for any person having the custody of a child under any order of justices (see secs. 5 and 7) to misapply moneys paid by the putative father for the child's support, or to ill-use the child; sec. 70 provides for the compulsory summoning of witnesses in bastardy proceedings.

3. 8 & 9 *Vict. c.* 10 (*The Bastardy Act*, 1845).—Sec. 4 provides that where a summons is applied for by a woman who is with child, the hearing is to be within two months after the birth; if the return day happens before the child's birth, power to adjourn till after the child's birth, and also until the mother is well, is given; sec. 5 gives the putative father power to abandon his appeal; sec. 6 provides that the woman shall give evidence at the hearing of the appeal in the same manner as at the hearing before the justices, and that the woman's evidence must be corroborated also at Quarter Sessions; sec. 7 gives both to the woman and to the alleged father the right to employ counsel or attorney at the Petty Sessions; sec. 8 deals with the case where a putative father fails to pay, and, though having no goods and chattels within the jurisdiction, has goods and chattels elsewhere, and provides that he shall be nevertheless liable to be committed; sec. 9 gives any one magistrate of the police courts of the metropolis power to do alone all things in bastardy matters which elsewhere must be done by more than one justice in Petty Sessions; sec. 10 defines "Petty Sessional Division"; sec. 11 defines "recorder."

4. 20 & 21 *Vict. c.* 43 (1857).—Secs. 2 and 3 apply to the stating of a case (see *infra*, No. 9).

5. 35 & 36 *Vict. c.* 65 (*The Bastardy Laws Amendment Act*, 1872) replaces in the main certain repealed sections of earlier Acts, and contains the principal law now in force relating to affiliation proceedings; sec. 3 sets out the conditions which give the Court jurisdiction in bastardy, and provides for the preliminary steps necessary to bring the alleged father before the Court of Petty Sessions; sec. 4 deals with the service of the summons, the hearing, the mode of proof, the several forms of the order, and the manner of enforcing it; sec. 5 provides that an order shall cease to be of force (except for the recovery of arrears) after the child shall have reached the age of thirteen years, or after the death of such child, but gives the magistrates a discretion to direct that the order shall continue in force until the child shall attain the age of sixteen; sec. 7 provides for the receipt by a relieving or other officer (under an appointment by two justices) of sums payable under an order in the event of the child becoming chargeable; sec. 9 gives Quarter Sessions the power on appeal to reduce the amount of the order.

6. 36 *Vict. c.* 9 (*The Bastardy Laws Amendment Act*, 1873).—Sec. 4 provides for the proof by affidavit (a form is given in Schedule 2 of the Act) of the service of the summons where the putative father lives out of the Petty Sessional Division where the application is made; sec. 5 gives the guardians power to obtain an affiliation order in the case of a bastard who has become chargeable; sec. 6 gives to the Local Government Board power to issue new or altered forms of proceedings in matters of bastardy; sec. 7 gives power to any one justice

to adjourn the hearing of a bastardy summons whenever two justices having jurisdiction to hear it are not present.

7. 37 & 38 *Vict. c.* 88 (*The Births and Deaths Registration Act*, 1874).—Sec. 7 deals with the registration of an illegitimate child, relieving the father of any duty in respect thereof.

8. 39 & 40 *Vict. c.* 61 (*The Divided Parishes and Poor Law Amendment Act*, 1876).—Sec. 24 gives the justices power in any proceeding by the guardians of the poor under 36 Vict. c. 9, sec. 5, to award costs to or against the parties in like manner and to the like effect as in the case of orders for the payment of money under 11 & 12 Vict. c. 43, s. 18.

9. 42 & 43 *Vict. c.* 49 (*The Summary Jurisdiction Act*, 1879).—Sec. 31 contains the preliminary procedure to be followed in appeals to Quarter Sessions from orders of Courts of summary jurisdiction. (See SUMMARY JURISDICTION). Sec. 33 applies to the stating of a special case; secs. 5 and 54 apply to the committal of the putative father if he makes default.

10. 44 & 45 *Vict. c.* 24 (*The Summary Jurisdiction* (*Process*) *Act*, 1881).—Sec. 6 enlarges the jurisdiction in bastardy of a Court of Summary Jurisdiction in England in respect of Scotland, and of a Sheriff-Court in Scotland in respect of England, and provides for the enforcement of English bastardy orders in Scotland and of Scotch orders in England.

11. 44 & 45 *Vict. c.* 58 (*The Army Act*, 1881).—Sec. 145 provides for the procedure to be followed in the case of affiliation proceedings against a soldier of the regular forces, and for the enforcement of an order made against any such soldier.

12. 47 & 48 *Vict. c.* 43 (*The Summary Jurisdiction Act*, 1884).—Sec. 6 makes it compulsory in bastardy appeals to follow the procedure provided by sec. 31 of the Summary Jurisdiction Act, 1879 (*ut sup.*). (See SUMMARY JURISDICTION.)

13. 53 & 54 *Vict. c.* 71 (*The Bankruptcy Act*, 1890).—Sec. 3 (12) provides that a composition or scheme accepted and approved in pursuance of this section, and sec. 10 provides that an order of discharge, shall not release the debtor from any liability under . . . an affiliation order . . . except to such an extent and under such conditions as the Court expressly orders in respect of such liability.

14. 55 & 56 *Vict. c.* 32 (*The Clergy Discipline Act*, 1892).—Sec. 1 provides that if an order in bastardy is made against a clergyman, any preferment held by him shall, within twenty-one days after the order becomes conclusive, be declared by the bishop to be vacant as from the date of the order, and he shall be incapable of holding preferment.

Forms.—The Local Government Board, acting under sec. 6 of 36 Vict. c. 9 (see *supra*), issued two General Orders, dated respectively the 4th August 1873 and the 8th January 1874, comprising schedules of forms. Those forms will be found in Glen's *Poor Law Orders*, and in books on bastardy law (*e.g.* Saunders' *Law of Affiliation*, and Lushington's *Law of Affiliation and Bastardy*).

It would seem that such of these forms as relate to proceedings subsequent to the order are now superseded by the Summary Jurisdiction Rules of 1886 (see *Glen's Poor Law Orders*, 1898, p. 874, *note*).

Case-Law.—A number of decisions of the Courts have been given upon the many and often difficult questions that have from time to time been raised in proceedings of affiliation; and inasmuch as the modern

English statute law in its principles and main outlines, and even in much of its wording, keeps very closely to the older law, it follows that not a few cases, decided upon the older statute and ranging over a long period of time, from the earliest legislation, viz., 18 Eliz. c. 3, s. 2, are still authority in current bastardy law.

Jurisdiction.—An order made without jurisdiction will be null and void, even though the alleged father appears to the summons and at the hearing, and makes no objection to the jurisdiction. The Bastardy Acts are limited to England (which includes Wales), but by 44 & 45 Vict. c. 23, s. 6, which will be noticed more fully later, an enlargement of jurisdiction in affiliation was given to England and Scotland, so that a Scotch Court and an English Court may respectively adjudicate in English and Scotch bastardy cases.

The primary fact which gives jurisdiction is the birth of a bastard child; the child must have been born alive; a still-born child cannot be the subject of a bastardy order (*R.* v. *De Brouquens*, 1811, 14 East, 277). The death of the child does not destroy the jurisdiction of the justices to make an order, but limits the scope of the order (sec. 4 of the Act of 1872). The birth must have taken place in England; and for this purpose an English ship on the high seas is deemed to be part of England (*Marshall* v. *Murgatroyd*, 1870, L. R. 6 Q. B. 31; 40 L. J. M. C. 7; 23 L. T. 393; 19 W. R. 72). A child begotten in England, but born out of England, cannot be filiated (*R.* v. *Blane*, 1849, 13 Q. B. 769; 3 New Sess. Ca. 597; 18 L. J. M. C. 216; 13 Jur. 854). If the child be born here, it is immaterial where the intercourse took place (*Hampton* v. *Rickard*, 1874, 43 L. J. M. C. 133; 30 L. T. 636; 38 J. P. 646). The mother, if she apply, must be a single woman. [See *Parties, inf.*] The applicant, if she be a married woman, will need to be *bonâ fide* separate from her husband at the time of the application in order to sustain the character of a single woman (*Jones* v. *Davies*, [1901] 1 K. B. 119; 70 L. J. M. C. 38; 83 L. T. 412; 49 W. R. 136; 65 J. P. 39). Her marriage after the birth of a bastard child takes away the jurisdiction (*Stacey* v. *Lintell*, 1879, 4 Q. B. D. 291; 48 L. J. M. C. 108; 40 L. T. 553; 27 W. R. 551; 43 J. P. 510; *Peatfield* v. *Childs*, 1899, 63 J. P. 117; *Tozer* v. *Lake*, 1879, 4 C. P. D. 322; 41 L. T. 280; 43 J. P. 656); *aliter*, where the guardians make the application. The death of the mother at any time before the hearing takes away all jurisdiction to make an order (*R.* v. *Armitage*, 1872, 7 L. R. Q. B. 773; 42 L. J. M. C. 15; 27 L. T. 41; 20 W. R. 1015; S. C. *Jessop* v. *Brierley*, 36 J. P. 488), because no order can be made without her evidence.

Where the application is by the guardians, jurisdiction is given by the fact that the child has become chargeable (sec. 5 of the Act of 1873), and an order may be made although the mother has married, and her husband is able to maintain the child (*Guardians of Plymouth* v. *Gibbs*, [1903] 1 K. B. 177; 72 L. J. K. B. 33; 87 L. T. 685; 51 W. R. 157; 67 J. P. 61).

Next, the alleged father must have been at some time within the jurisdiction, for the summons must be issued and served in England (*R.* v. *Lightfoot*, 1856, 6 El. & Bl. 822; 25 L. J. M. C. 115; 2 Jur. (N. S.) 786; 4 W. R. 655), either upon him personally or at his last place of abode here. [See *Process, inf.*]

The Summary Jurisdiction Process Act, 1881, 44 & 45 Vict. c. 24, s. 6, gives a Court of summary jurisdiction in England and a Sheriff-

Court in Scotland, respectively, jurisdiction to make an order or decree in bastardy against a person within the jurisdiction of the Court, "notwithstanding that such person ordinarily resides, or the child has been born, or the mother of it ordinarily resides, where the Court is English, in Scotland, or where the Court is Scotch, in England, in like manner as the Court has jurisdiction in any other case." The effect is to give jurisdiction in bastardy proceedings to the Scotch tribunals in a case which would otherwise be partly or solely English, and to the English tribunals in a similar Scotch case, if the person sought to be made liable is within the jurisdiction. The statute is based upon the principle of the maxim *Actor sequitur forum Rei* (*per* Lord Selborne, L.C., in *Berkley* v. *Thompson*, 1884, 10 App. Cas. 45; 54 L. J. M. C. 57; 52 L. T. 1; 33 W. R. 525; 49 J. P. 276). If the father is in Scotland, the mother of a bastard child born in England may, therefore, proceed to Scotland and bring her action of aliment against him there (see ALIMENT: *Encyclopædia of Scots Law*). And the mother of a child born in Scotland may come to England and institute proceedings here against the father if he is in the English jurisdiction. There is no such system of cross jurisdiction between England and Ireland or the Isle of Man or the Channel Islands. The jurisdiction given by the above-named Act can only be invoked by means of a summons issued in the country of the tribunal which is to adjudicate; the words of the second clause of sec. 6, "any process issued in England or Scotland to enforce obedience to such order," do not apply to the summons which commences the proceedings (*Berkley* v. *Thompson*, *ut sup. cit.*).

Within England, the special local jurisdiction is determined by the fact of the woman's residence; she is to make application to "any one justice acting . . . for the place where she may reside" (35 & 36 Vict. c. 65, s. 3); if she has a settled home, she must apply at the nearest Court; where she has none, she may apply wherever she happens to be for the time residing; she may have chosen the particular place with the sole intention of making application there in preference to all other places, but if her action be *bonâ fide*, such residence, of however short a standing, will nevertheless suffice, even though she means to go away after succeeding in her application (*R.* v. *Hughes*, 1857, 26 L. J. M. C. 133; Dears. & B., C. C. 188; 3 Jur. (N. S.) 448); but the so-called residence must not be a mere colourable device; for instance, having failed more than once in making application elsewhere, she will not be allowed, by a temporary change of abode, to obtain a more favourable tribunal "because people said if she came there she would have a better chance" (*R.* v. *Myott*, 1863, 32 L. J. M. C. 138; 7 L. T. 785; S. C. *Myott* v. *Barber*, 27 J. P. 119); and an order made, where there has in fact been no such real residence, but a flying visit or a mere sojourn of a few hours, will be annulled for want of jurisdiction, even though at the hearing no objection was taken (*Vevers* v. *Mains*, 1888, 4 T. L. R. 724).

A further point of special jurisdiction must be noted: the justice who is to issue the summons must be the same justice to whom the original application was made; therefore, if, having heard the application but not having granted a summons, he should die, or if he cease to hold office, either by reason of having been a merely *ex officio* justice, as mayor or chairman of a district council, or if he be removed from the commission of the peace, the woman must begin her proceedings *de novo*; a fresh application may be made to another magistrate if the limit of

time has not been exceeded; but if the time has elapsed no application can be entertained (*R.* v. *Pickford*, 1861, 1 B. & S. 77; 30 L. J. M. C. 133; 4 L. T. 210; 9 W. R. 634; 7 Jur. (N. S.) 568).

When jurisdiction is sought to be given, under sec. 3 of the Act of 1872, at any time more than twelve months after the birth of the child, upon proof that the alleged father has paid money for the maintenance of the child, this condition is not satisfied by the payment of money in accordance with an order obtained by the guardians under sec. 5 of the Act of 1873 (*Billington* v. *Cyples*, 1885, 52 L. T. 854; 49 J. P. 582). Where, under sec. 3 of the Act of 1872, jurisdiction is given to grant a summons at any time within twelve months next after the return to England of the alleged father upon proof that he ceased to reside in England within twelve months next after the birth of the child, the words "ceased to reside" have been interpreted to cover the case of the alleged father leaving England before the birth (*R.* v. *Evans*, 1896, 1 Q. B. 288; 60 J. P. 39); for "a man ceases to reside all the time that he is absent; it is like desertion—a continuing state of facts" (*per* Hawkins, J., S. C. in 60 J. P. at p. 40).

Where the alleged father is a soldier in the regular forces, the provisions of the Army Act, 1881, must be observed in order to give jurisdiction (see *Process*); no process whatever in any bastardy proceeding is valid against such soldier if served after such soldier is under orders for service beyond the seas (sec. 145 of 44 & 45 Vict. c. 58).

Certiorari is the remedy against orders made with want of jurisdiction (see CERTIORARI), and will lie, even though the defect of jurisdiction is not apparent on the face of the order, if it can be shown by affidavit that such defect existed (*R.* v. *Bolton*, 1841, 1 Q. B. 66; *R.* v. *Farmer*, [1892] 1 Q. B. 637; 61 L. J. M. C. 65; 65 L. T. 736; 56 J. P. 341; 40 W. R. 229; 8 Times L. R. 159).

Parties.—The mother, if she herself make the application, must be a single woman: *i.e.* a spinster or a married woman who has been reduced to the condition of a single woman by widowhood, or otherwise, as by the fact of her living apart from her husband. It has long been well settled law that the child of an adulterous intercourse is within the Bastardy Acts (*R.* v. *Luffe*, 1807, 8 East, 193; *R.* v. *Pilkington*, 1853, 2 El. & Bl. 546; 21 L. T. (O. S.) 165; 17 Jur. 554; 17 J. P. 388; S. C. *Ex parte Grimes*, 22 L. J. M. C. 153). Not only must the mother during the time in which the child was begotten have been living under such circumstances as to make the presumption of legitimacy rebuttable; but at the time of making the application, as well as at the hearing of the summons and the making of the order, she must be a single woman within the definition given; it follows, therefore, that a woman who married after the birth of an illegitimate child cannot obtain an order after the marriage (*Stacey* v. *Lintell*, 1879, 4 Q. B. D. 291; 48 L. J. M. C. 108; 27 W. R. 551; 43 J. P. 510), not even though she obtained a summons before the marriage and had only failed to serve it through the contrivance of the alleged father (*Tozer* v. *Lake*, 1879, 4 C. P. D. 322; 41 L. T. 280; 43 J. P. 656). A colourable separation, devised between husband and wife with the sole object of enabling the woman to make an application in respect of a child born during the husband's absence, will not avail, when the husband has returned to cohabitation after the child's birth and with knowledge thereof (*Jones* v. *Davies*, [1900] 1 K. B. 119; 70 L. J. 38; 83 L. T. 412; 49 W. R. 136; 65 J. P. 39).

Further, a married woman, who has had a child before marriage, and whose husband has at once turned her out of the house and refused to maintain her and the child so soon as he has discovered the fact of the child's existence, is not a single woman within the Bastardy Acts (*Peatfield* v. *Childs*, 1899, 63 J. P. 117). The mother's marriage will not vacate an order once made, unless by the terms of the order the liability is to cease upon the woman's marriage (*Sotheron* v. *Scott*, 1881, 6 Q. B. D. 518; 50 L. J. M. C. 56; 44 L. T. 523; 45 J. P. 423; 29 W. R. 666); and such an order is enforceable even though the husband be able to maintain the child (*Hardy* v. *Atherton*, 1881, 7 Q. B. D. 264; 50 L. J. M. C. 105; 44 L. T. 776; 45 J. P. 683; 29 W. R. 788); notwithstanding the provisions of 4 & 5 Will. IV. c. 76, s. 57, which throws upon a husband the liability to maintain all his wife's children.

It seems that the applicant need not herself be English by birth or nationality (compare *Hampton* v. *Rickard*, 1874, 43 L. J. M. C. 133; 30 L. T. 393; 38 J. P. 646, and *vid. dicta* of Lord Denman, C.J., in *R.* v. *Blane*, 1849, 3 New Sess. Ca., pp. 600, 601).

The guardians may be the applicants for a bastardy order, under sec. 5 of the Act of 1873, when a bastard becomes chargeable to a union or parish; the guardians are not limited as to time; the mother may avail herself, upon an application of her own, of the fact of such order having been made as *primâ facie* evidence, but she is still bound by the limitation of time prescribed in sec. 3 of the Act of 1872.

An indispensable condition to a person being adjudged a putative father, is that he should have reached the age of fourteen at some date in the period during which the child must have been begotten according to the course of nature; if he be under fourteen years of age, by however short a time, the law imputes to him "an apparent impossibility of procreation" (Co. Lit. 244*a*, and Hale, 1 P. C. 630), and the rule affords an absolute bar, and no evidence can be admitted which tends to show that, notwithstanding the presumption, he nevertheless was the father of the child (*R.* v. *Groombridge*, 1836, 7 C. & P. 582; *R.* v. *Jordan*, 1839, 9 C. &. P. 118; and *R.* v. *Brimilow*, 1840, 2 Moo. C. C. 122). With respect to his nationality, it has been decided that he need not be English (*Hampton* v. *Rickard*, 1874, 43 L. J. M. C. 133; 30 L. T. 393; 38 J. P. 646). An order may be made and enforced against a soldier in the regular forces according to the provisions of the Army Act, 1881 [see *Jurisdiction*]. Where a clergyman is adjudged the putative father, and the order is not set aside, he loses the right to hold a benefice (Clergy Discipline Act, 1892, s. 1).

Process.—The preliminary steps are set out fully in sec. 3 of the Act of 1872, and a close adherence to its provisions is necessary. A distinction is to be drawn, however, between matters which go to the root of the jurisdiction, such as the failure to serve the summons upon the alleged father or to leave it at his "last place of abode" (see *R.* v. *Farmer*, *ut sup. cit.*), and those irregularities which are mere matters of procedure, in respect of which the omission to comply with merely directory provisions may be waived by the appearance of the alleged father, without making objection, at the hearing of the summons. Such, for example, is the issue of a summons upon an application made more than twelve months after the birth of the child, when the mother has alleged, but not proved on oath, as it seems she ought to do, that the

father paid money within the twelve months (*R.* v. *Berry*, 1859, 8 Cox C. C. 121; Bell C. C. 46; 28 L. J. M. C. 86; 32 L. T. (O. S.) 324; 5 Jur. (N. S.) 320; 7 W. R. 229); the ground of the decision being that bastardy proceedings are of a civil character, and mere irregularities are cured by the defendant's appearance (see also *R.* v. *Fletcher*, 1871, 40 L. J. M. C. 123; 24 L. T. 742). If, however, the alleged father do not appear, the jurisdiction fails unless the prescribed procedure has been strictly followed.

The first step is the application; it ought, when the child is not yet born, to be in the form of a deposition on oath (see *R.* v. *Berry*, *ut sup. cit.*); when "proof" has to be given, at the time of the application, that the father has paid money or has been absent during the twelve months, such proof ought to be in writing upon oath; but omissions in such matters are of the class of mere irregularities (*R.* v. *Berry*, *ut sup. cit.*). The same justice who receives the application must also issue the summons (see *R.* v. *Pickford*, *ut sup. cit.*, under *Jurisdiction*). He need not grant the summons at once; the words "thereupon issue" (of sec. 3) being interpreted not to mean "immediately issue" (*Potts* v. *Cambridge*, 1858, 8 El. & Bl. 847; 27 L. J. M. C. 62; 4 Jur. (N. S.) 72; 6 W. R. 214). In his discretion, when, for example, the alleged father has no known address, the justice may keep the application suspended, even until after the twelve months have run out; during this period, however, the fate of the proceedings is subject to the risk, already mentioned, of the magistrate dying or ceasing to hold office. When a summons has been granted, but cannot be served because the alleged father is not to be found, another summons may be issued upon the original application and served even after the lapse of the twelve months (*R.* v. *Chugg*, 1870, 11 Cox C. C. 558; 22 L. T. 556; 34 J. P. 469). Where the application has been granted and the summons heard and dismissed on the merits, the application will be deemed to be exhausted, and a fresh summons ought not to be granted on a new application after the time has run out (*R.* v. *Robinson*, [1898] 1 Q. B. 734; 67 L. J. Q. B. 510; 78 L. T. 350; 62 J. P. 309; 46 W. R. 462). Personal service must be effected upon the alleged father; failing that, then service at "his last place of abode." "The last place of abode" must, for this purpose, be in England, for there can be no service out of England (*R.* v. *Lightfoot*, 1856, 6 El. & Bl. 822; 25 L. J. M. C. 115; 2 Jur. (N. S.) 786; 4 W. R. 655); and if he have acquired anywhere a place of abode out of England at the time of the alleged service, his "last place of abode" is no longer in England (*R.* v. *Farmer*, [1892] 1 Q. B. 637; 61 L. J. M. C. 65; 65 L. T. 736; 56 J. P. 341; 40 W. R. 229; 8 Times L. R. 159). But when the alleged father has had a home in England and has left it to go away to avoid the service of the summons, a service at that home will be good; for though he swears that he had no intention to return, the Court may infer that his absence was temporary (*R.* v. *Higham*, 1857, 7 E. & B. 557; 26 L. J. M. C. 116; 22 J. P. 6; 5 W. R. 537; 3 Jur. (N. S.) 691). "Last place of abode" implies the lack of a present place of abode; a new place of abode cannot be gained while the alleged father is *in transitu*, nor by a temporary sojourn; see *R.* v. *Evans* (*alias Ex parte Rice Jones*), 1850, 4 New Sess. Cas. 191; 19 L. J. M. C. 151; 1 L. M. & P. 357; *R.* v. *Davis*, 1853, B. C. 191; 22 L. J. M. C. 143; 17 Jur. (O. S.) 577; *R.* v. *Damarell*, 1867, L. R. 3 Q. B. 50; 8 B. & S. 659; 37 L. J. M. C. 21;

R. v. *Lee*, 1888, 58 L. T. 386; 52 J. P. 345; 36 W. R. 415). Absence from England with no intention of returning is no bar to such service, provided always a new home has not been gained (*R.* v. *Webb*, [1896] 1 Q. B. 487; 65 L. J. M. C. 98; 74 L. T. 428; 44 W. R. 527; 60 J. P. 280; 12 Times L. R. 293).

Process may be issued in the usual way upon a soldier, provided that he is quartered within the Petty Sessional Division in which the proceeding is instituted, and is not under orders for service beyond the seas; if he is not in the Petty Sessional Division, the process must be served on his commanding officer, and a sum of money, sufficient to enable him to attend the Court and hearing of the summons and return to his quarters, must be left with the summons in the hands of the commanding officer, otherwise the process is not valid; if he is under orders for service beyond the seas, no process whatsoever is valid (Army Act, 1881, sec. 145).

The "six clear days at least" (secs. 3 and 4 of the Act of 1872), which must elapse between the issue of the summons and the hearing, are to be six days exclusive both of the day of the service and that of the hearing. No service out of England of a summons issued in England is possible (*R.* v. *Lightfoot*, 1856, 6 E. & B. 822; 25 L. J. M. C. 115; 3 Jur. (N. S.) 786; 4 W. R. 655; *Berkley* v. *Thompson*, 1884, 10 App. Cas. 45; 54 L. J. M. C. 57; 49 J. P. 276; 33 W. R. 525).

The hearing must be fixed for a date within forty days from the service of the summons (sec. 4 of the Act of 1844), except in the case where application is made before the birth, when, by sec. 4 of the Act of 1845, the hearing may be at any time within two months after the birth.

Hearing.—Two justices must adjudicate, except where there is statutory provision for one magistrate, as in the metropolitan district, to act alone. The case will be heard in all respects according to the usual general rules followed in other civil proceedings, and the same laws of evidence will be observed. At the hearing the mother must give evidence, whether the application be made by herself or the guardians; accordingly, if she be dead, there can be no jurisdiction to make the order (*R.* v. *Armitage*, otherwise *Jessop* v. *Brierley*, 1872, L. R. 7 Q. B. 773; 42 L. J. M. C. 15; 27 L. T. 41; 20 W. R. 1015; 36 J. P. 488). Where the guardians have already obtained an order, that order is *primâ facie* proof of her case; there seems to be no case deciding how far this provision affects the general principle that the mother must give evidence and be corroborated. The mother may be cross-examined to show that she has been familiar with other men, but the cross-examiner will be bound by her answer, and no evidence to contradict her will be admissible unless it tends to prove that such intercourse took place at a time when the child might have been begotten (*R.* v. *Gibbons*, 1862, 31 L. J. M. C. 98; 5 L. T. 805). The alleged father need not attend, and cannot be compelled to attend, unless he is summoned under 7 & 8 Vict. c. 101, as a witness. In his absence strict proof of the service of process must be given; if he has been residing out of the Petty Sessional district and was served outside that district, proof of service may be by affidavit in the form prescribed by sec. 4 of the Act of 1873 and the Schedule thereto. Both parties may have the assistance of solicitor and counsel; the alleged father "may appear by counsel or attorney," that is, he need not be himself present (*R.* v. *Shipperbottom*,

1847, 10 Q. B. 514; 2 New Sess. Cas. 641; 16 L. J. M. C. 113). He may be called as a witness for the woman; but even though he be in Court he cannot be compelled to go into the witness-box, unless he has been served with a witness summons (under 7 & 8 Vict. c. 101, s. 70); but if he waives the lack of a summons and gives evidence, he will be bound to answer all questions, and may be committed to prison as provided in that section if he refuses to do so (*R.* v. *Flavell*, 1884, 14 Q. B. D. 364; 52 L. T. 133; 49 J. P. 406). He may call witnesses to prove somebody other than himself to be the father. Where evidence is wrongly admitted to contradict the woman upon matters where her answers ought to have been taken, an indictment for perjury against the witness will nevertheless lie (*R.* v. *Gibbons, ut sup. cit.*).

Legitimacy; Non-Access.—The presumption of legitimacy is strong in the case of a child born to a married woman, and must not be lightly overset (*Morris* v. *Davies*, 1837, 5 Cl. & F. 163; 1 Jur. 911 [see BASTARD; LEGITIMACY]); a contrary presumption arises, where the woman is separated from her husband. The fact that the wife is living in adultery will not be of itself enough to displace the presumption of legitimacy, unless it be proved that the husband had no access (*R.* v. *Inhabitants of Mansfield*, 1841, 1 Q. B. 444). Proof of non-access must be given by testimony other than that of the woman or her husband (*Goodright* v. *Moss*, 1778, 2 Cowp. 594), and is a condition precedent to the entering upon the question of the paternity of the child (*R.* v. *Luffe*, 1807, 8 East, 193). But if the woman gives evidence of non-access incidentally, and there be other proof of that fact, the justices will be deemed to have acted upon the other evidence in deciding that there was no access (*R.* v. *Luffe, ut. sup. cit.*). The old notion that there must be proof of non-access during the whole period of the gestation is not law (*R.* v. *Luffe, ut sup. cit.*). When non-access has been established, the applicant is admissible to give evidence of the intercourse of which the bastard child is said to be the offspring.

Gestation.—The question of gestation belongs to medical jurisprudence (see MEDICAL JURISPRUDENCE). The manuals of bastardy law give tables of gestation: *e.g.* Saunders' *Law of Affiliation;* Lushington's *Affiliation and Bastardy.* If the gestation is said to have been unduly prolonged or unusually short, the evidence of a midwife or of a qualified medical man may be desirable.

Corroboration.—The evidence of the mother must be corroborated in "some material particular to the satisfaction of the justices" (see sec. 4 of the Act of 1872). The last words leave a wide discretion to the justices in deciding what is corroboration: and the High Court will be loth to set aside a decision based upon evidence which is at all capable of being corroboration. Corroboration of the actual fact of intercourse is not, as a rule, forthcoming; proof of opportunity, letters written by the man, conversations, keeping company, the payment of money for the expenses of the child's birth or for its maintenance, the man's demeanor on being taxed with the paternity, may afford such evidence. Where a man on being so taxed did not in so many words deny or admit the paternity, but said he would rather go to America than keep the child, the Court held that there was evidence capable of being corroboration (*R.* v. *Pearcey*, 1852, 17 Q. B. 902*n.*; 18 L. T. (O. S.) 238; 16 Jur. 193). Evidence of acts of familiarity, although such acts took place at a time before the child could have been begotten, may be corrobora-

tion (*Cole* v. *Manning*, 1877, 2 Q. B. D. 611; 46 L. J. M. C. 175; 35 L. T. 941; 41 J. P. 469). So also may silence or the lack of positive denial, in the face of an accusation (*Hill* v. *Denmark*, 1895, 59 J. P. 345). Breach of promise cases furnish some guidance; *Bessela* v. *Stern*, 1877, 2 C. P. D. 265; 46 L. J. C. P. 467; 37 L. T. 88; 42 J. P. 197; 25 W. R. 561, is an example; the defendant, without any admission of the promise, said to a third person who accused him some time after of seducing the girl, he would marry the plaintiff; evidence that he said so was held to be corroboration in a material particular. The omission of the man to answer letters taxing him with the paternity is not of itself corroboration (*Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762; 40 W. R. 114; and see *Reffell* v. *Morton*, *ut cit. inf.*). Though payment of money for the maintenance of the child does not upon the application need corroboration (*Hodges* v. *Bennett*, 1860, 5 H. & N. 625; 29 L. J. M. C. 224; 2 L. T. 190; 8 W. R. 463), yet where the applicant afterwards at the hearing seeks to found corroboration solely upon such payment, the payment must be proved by other evidence besides her own unsupported word. The true rule of corroboration seems to be that corroboration must be of something done or omitted by the person charged with the misconduct; the applicant in a case (*Reffell* v. *Morton*, heard in the High Court, 3rd and 4th April 1906, see *Sussex Daily News*, 4th and 5th April 1906) who was a domestic servant living in the appellant Reffell's house, had changed from one bedroom to another, nearer to the appellant's, and the fact of the change was proved by independent evidence; the girl said further that the change was made by her at the defendant's request, but that part of her statement was not corroborated. The Court held that there was no corroboration, but laid down no general rule. In the same case the Court held that it was not corroboration to prove that the man had received but had not answered a letter taxing him with the paternity. Innocent circumstances, such as the fact of "being seen out of an evening together," may afford corroboration, and an inquiry by the man whether "Till" (the girl) "was going to swear the child," were in one case held to be corroboration (*Harvey* v. *Anning*, 1903, 87 L. T. 687; 67 J. P. 73: Lord Alverstone, C.J., and Channell, J.; *dissentiente*, Wills, J.).

It is to be observed that when a successful application has been made by guardians under sec. 5 of the Act of 1873, and the mother afterwards applies for an order, the order made on the guardians shall be *primâ facie* evidence of the paternity: words which shift the *onus* of proof: but it would seem to follow that though on the hearing, where the guardians were the applicants, the alleged father had the same right of audience and the same right of appeal, it will be at the subsequent hearing open to him again to contest the mother's application upon the merits, and to adduce evidence to rebut the *primâ facie* case made on the mother's behalf.

Decision.—If the magistrates adjudge the man to be the putative father, they may proceed to make an order. The decision is given when the justices pronounce it *ore tenus;* and the order is drawn up in its terms (*Ex parte Johnson*, 1863, 3 B. & S. 947). See the forms of order of the Local Government Board. In making the order the justices are to have "regard to all the circumstances of the case" (sec. 4 of the Act of 1872). These words give them a discretion as to the amount and the period for which the liability is to continue. The amount may not exceed

five shillings (sec. 4 of the Act of 1872), and the period may be for thirteen years or for sixteen, and it would seem for any less period or until the mother should marry; when that time has elapsed no fresh application can be made (*Pearson* v. *Heys*, 1881, 7 Q. B. D. 260; 50 L. J. M. C. 124; 45 L. T. 680; 45 J. P. 730; 30 W. R. 156). But it is unusual to make the order for any other period than thirteen or sixteen years or until the child's mother marry; the latter form, though the present statutes are silent and the current forms do not contemplate such an order, would be good (*William* v. *Davies*, 1883, 11 Q. B. D. 74; 52 L. J. M. C. 87; 47 J. P. 581). The liability to pay in ordinary cases dates from the date of the order; but where the application was made before the birth or within two months after, the justices may make the weekly sums payable from the date of the birth. They may order the putative father to pay the expenses incidental to the birth of the child; and also (if it has died before the order) the funeral expenses. Where the application was made before the birth or within two months, the justices may (if the child has died meantime) order payment of a sum for the child's maintenance and education for so long as it lived. The justices, when they make an order, may give the applicant the costs of the proceedings, including costs for legal assistance; and, if the alleged father is a soldier, may adjudge to her as costs the sum of money (if any) paid as conduct money on the service of the summons (Army Act, 1881, s. 145). The order must express to be made "for the maintenance and education of the child" (*R.* v. *Padbury*, 1879, 5 Q. B. D. 126; 49 L. J. M. C. 55; 44 J. P. 361; 28 W. R. 182), and all the steps of the affiliation proceedings, *e.g.* that the evidence was given in the presence and hearing of the alleged father, or, if it was not so given, what were the circumstances which prevented the evidence being so given (*R.* v. *Grafton*; *Ex parte Bann*, 1848, 3 New Sess. Cas. 157; 2 B. C. R. 242; 5 D. & L. 568; 17 L. J. M. C. 125; 13 Jur. 539), ought to be set out with great accuracy and particularity (*R.* v. *Read*, 1839, 9 Ad. & Ell. 619). If the order is wrongly drawn up, the justices may treat it as non-existent and proceed to have an accurate one drawn up without the first being set aside (*R.* v. *Brisby*, 1849, 1 Den. C. C. 416; 2 Car. & Kir. 962; 18 L. J. M. C. 157; *R.* v. *Lanyon*, 1872, 27 L. T. (N. S.) 355). Where twins are the subject of the proceedings, separate orders should be drawn up as to each; there seems to be no decision that there should be separate applications and separate hearings and separate orders in such a case. If the summons be dismissed, the justices have no power to give to the alleged father his costs of the hearing, for "there is no form of adjudication in favour of the party summoned, nor any enactment as to costs to him" (*per Curiam* in *R.* v. *Machen*, 1849, 14 Q. B. 74; 3 New Sess. Cas. 629; 18 L. J. M. C. 213), except where the guardians are the applicants (39 & 40 Vict. c. 61, s. 24).

Finality of the Decision: res judicata.—A decision of the Petty Sessions, making an order, is the subject of appeal to Quarter Sessions. The mother has no right of appeal; but she has the power to obtain a re-hearing, so long as she is not shut out by lapse of time. She may make a fresh application, even though the decision was upon the merits (*R.* v. *Machen*, 1849, 14 Q. B. 74; 3 New Sess. Cas. 629; 18 L. J. M. C. 213; *Ex parte Westerman*, 1851, 16 L. T. (O. S.) 420); such second hearing is in the nature of a new trial. No doubt the magistrates will not lose sight of the fact that there has been a previous hearing and dismissal

(*per Curiam* in *R.* v. *Machen, ut sup. cit.*); but it may be that the applicant failed on the first occasion, not because the justices disbelieved her, but from lack of corroborative evidence (*R.* v. *Harrington* or *Herrington*, 1864, 3 New Rep. 468; 9 L. T. (N. S.) 721; 12 W. R. 420; 28 J. P. 485); or that the dismissal was obtained by testimony subsequently found to be false (*R.* v. *Gaunt*, 1867, L. R. 2 Q. B. 466; 36 L. J. M. C. 89; 16 L. T. 379; 15 W. R. 1172; 8 B. & S. 365; 31 J. P. 342). But even though no fresh evidence is able to be adduced, the rule is clear that a dismissal affords no bar in law to a subsequent application, if it be made within the twelve months. Where a dismissal has been due to a technical objection, which the justices might have amended, the original application will still hold good, and another summons may issue upon it even after the lapse of the time limited (*R.* v. *Hall and Another and Gillespie*, 1887, 57 L. T. 306). But when there has been a real hearing and determination, and the case has been dismissed upon the merits or for the lack of corroboration, the application is spent and cannot be made to avail for a new summons; a fresh application may be made, if the time has not run out; if it has run out, no re-hearing can be obtained (*R.* v. *Thomas*, 1863, 8 L. T. (N. S.) 460; 27 J. P. 694).

The failure of the guardians to obtain an order will not preclude the mother from making application if she be in time; and her failure will not preclude the guardians from obtaining an order if the child becomes chargeable.

As to *res judicata* generally, see *General Outline of the Law, supra*, and the case of *Anderson* v. *Collinson*, there cited.

The alleged father may seek to get rid of an order of the justices in bastardy by means of *certiorari*, which will lie—(*a*) where there was, in fact, a real want of jurisdiction, even though it does not appear on the face of the proceedings; (*b*) where there has been "legal" defect, if such is apparent upon the face of the order. The order may be thus quashed even after an appeal to Quarter Sessions; and a failure to obtain this remedy will not affect the right of appeal to Quarter Sessions. But it has been held that no writ of *certiorari* will be granted if an appeal is pending (*R.* v. *Sparrow*, 1788, 2 T. R. 196A). [See CERTIORARI.]

There is also the remedy by way of case stated under 20 & 21 Vict. c. 43, ss. 3, 4, and the Summary Jurisdiction Act, 1879, s. 33. If this remedy be pursued, the alleged father foregoes his right to appeal (sec. 14 of 20 & 21 Vict. c. 43).

Appeal.—The preliminary stages of the appeal are now taken in accordance with sec. 31 of the Summary Jurisdiction Act, 1879: the appeal is to be to the next practicable sessions, not less than fifteen days from the day of the decision (subs. 1); notice is to be given within seven days, to be served on the clerk to the justices and on the other party, *i.e.* the mother or the guardians, whichever of them made application, and the general grounds of appeal are to be given in the notice (subs. 2). See as to grounds of appeal, *R.* v. *Shingler*, otherwise *Smith* v. *Shingler* or *Shingler* v. *Smith*, 1886, 17 Q. B. D. 49; 55 L. J. M. C. 147; 54 L. T. 759; 51 J. P. 152; 34 W. R. 490; and the appellant shall, within three days, enter into a recognisance, or, if the parties think it expedient, make a deposit instead (subs. 3). Notice of appeal must be given to the mother herself; service of it upon her solicitor will not suffice.

At the hearing of the appeal the parties appear by counsel; but whereas in many appeals two counsel a side are generally engaged, it is a usual rule of the Bar practising at sessions that in bastardy appeals one counsel alone for each party, except perhaps for the guardians where they are respondents, is enough, the mother and the putative father seldom or never being people of substance. As a necessary commencement of an appeal, the service of notice must be proved unless it be admitted; the mother herself is competent to prove service (*R.* v. *Middlesex JJ.*, 1848, 2 B. C. Rep. 271; 3 New Sess. Cas. 152; 5 D. & L. 580; 17 L. J. M. C. 111; 11 L. T. (O. S.) 132; 12 Jur. (O. S.) 434). If she has died before service could be effected, the service is dispensed with, because her death, through the act of God, rendered service impossible (*R.* v. *Leicestershire JJ.*, 1850, 15 Q. B. 88; 4 New Sess. Cas. 124; 19 L. J. M. C. 209; 14 Jur. 550). If the woman be dead, it is a moot point whether or no the appeal must be allowed; for by sec. 6 of the Act of 1845 she is a necessary witness; it is open to argument that her depositions given at the original hearing are admissible in evidence upon the appeal. In *R.* v. *Armitage*, 1872, 1 L. J. Q. B. 773; 42 L. J. M. C. 15; 27 L. T. 41; 20 W. R. 1015; sub nom. *Jessop* v. *Brierley*, 36 J. P. 488, Hannen, J., left the question doubtful: see also *R.* v. *Ravenstone*, 1793, 5 T. R. 373, and *dicta* of Patteson, J., in *R.* v. *Leicestershire JJ.*, at p. 129, New Sess. Ca., who thought the deposition clearly admissible. After proof of notice of appeal the respondent begins, the trial being a re-hearing; by sec. 6 of the Act of 1845, the woman's evidence must be corroborated by other "testimony" in some material particular to the satisfaction of the justices.

The Court may allow the appeal, or confirm the order, or, by sec. 9 of the Act of 1873, may reduce the amount ordered to be paid; no specific power is given to vary the order in any other way. The result of the appeal is, as a general rule, a final determination of the whole proceedings. Where the order is quashed on the merits, it is so absolutely (*R.* v. *Glynne*, 1871, L. R. 7 Q. B. 16; 41 L. J. M. C. 58; 26 L. T. 61; sub nom. *R.* v. *Flintshire JJ.*, 20 W. R. 94), and to quash it for lack of corroboration has been held (*R.* v. *Glynne, ut sup. cit.*) to be a decision upon the merits, so as to make the result final. But where the appeal was allowed in the absence, through a *bonâ fide* mistake, of the respondent, her counsel having applied for and been refused an adjournment till the following day, it was held that proceedings might be begun anew before justices, on a fresh application (*R.* v. *May*, 1880, 5 Q. B. D. 382; 28 W. R. 918; S. C., *R.* v. *Phillips*, 42 L. T. 772; S. C., *R.* v. *Essex JJ.*, 49 L. J. M. C. 67; 44 J. P. 538).

The appellant, by sec. 5 of the Act of 1845, may abandon his appeal by notice in writing to the mother and to the justices of the Petty Sessions, without his recognisances being estreated, if he pays or tenders to the mother all sums due under the order, and the costs occasioned by such notice of appeal.

Quarter Sessions may give the successful party costs; in practice, the alleged father, if he succeeds, seldom, however, is given his costs of the appeal against the mother; under ordinary circumstances, if the guardians are the respondents, it would seem right that he should be allowed costs against them.

The costs of the appeal are recoverable by proceedings under 11 & 12

Vict. c. 43, s. 27, and are within the exceptions under the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 4; therefore, non-payment may be visited by imprisonment (*R.* v. *Pratt*, 1870, L. R. 5 Q. B. 176; 39 L. J. M. C. 73; 18 W. R. 626; S. C., *Ex parte Cole*, 21 L. T. 750).

Application of the Summary Jurisdiction Acts to Affiliation Proceedings.—Under this head a *dictum* of Lord Selborne, L.C., in *Berkley* v. *Thompson*, 1884, 10 App. Cas., at p. 47, should be borne in mind: "The bastardy law is one thing and the Summary Jurisdiction Acts are another." Therefore the Summary Jurisdiction Acts apply to bastardy proceedings in those respects only in which they are expressly made to apply.

Sec. 35 of the Summary Jurisdiction Act of 1848, 11 & 12 Vict. c. 43, provides that nothing in this Act shall "extend or be construed to extend to any complaints, orders or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to the backing of warrants for compelling the appearance of such putative father or warrants of distress, or to the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same." Secs. 3 and 19 apply generally to the backing of warrants; sec. 3 incorporates with this Act the provisions of the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, which are applicable to backing and execution of warrant; those sections are 11, 12, 13, 14, 15. They do not apply to the service of a bastardy summons, which remains subject to the special provisions of the bastardy laws; there is no power to compel the attendance of the alleged father at the hearing of the summons. So far, the Summary Jurisdiction Acts apply only to those proceedings in bastardy which arise after an order has been made. The Summary Jurisdiction Act of 1879, by sec. 54, is applied to "the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information, and shall apply to the proof of any summons, notice, process, or document in any matter of bastardy, and of any handwriting or seal in any such matter, and to an appeal from an order in any matter of bastardy." Sec. 32, now repealed, enacted that an appeal would not be deemed invalid for being not in accordance with this Act, so long as it were in accordance with the Act giving the right of appeal. A choice of procedure was therefore left. The effect of sec. 6 of the Summary Jurisdiction Act of 1884 is to make it compulsory to comply with the Act of 1879 in bastardy; therefore it is now necessary to give the general grounds of appeal (*R.* v. *Shingler*, otherwise *Smith* v. *Shingler*, or *Shingler* v. *Smith*, 1886, 17 Q. B. D. 49; 55 L. J. M. C. 147; 54 L. T. 759; 51 J. P. 152; 34 W. R. 490). Other changes as to appeals consist in the alternative of a deposit instead of a recognisance and the substitution of the time limits of the Summary Jurisdiction Act, 1879 (s. 31). In respect of the committal of a defaulting alleged father, sec. 4 of the Bastardy Act of 1872 must be read with sec. 5 of the Summary Jurisdiction Act, 1879, and therefore the scale of imprisonment provided in that section applies. The special reciprocal jurisdiction in bastardy given by the Summary Jurisdiction (Process) Act, 1881, to England and Scotland respectively in Scots and English

bastardy matters is contained in sec. 6; it is only necessary to say that in *Berkley* v. *Thompson, ut sup. cit.*, it was decided that a summons in bastardy issued in one of these two countries cannot be served in the other. It is a moot point whether the power to enforce obedience to a bastardy order made in one country by endorsing and executing it in the other (which is given by sec. 6 of the last Act), as between England and Scotland, did not already exist by the joint effect of sec. 35 of the Summary Jurisdiction Act, 1848, and sec. 54 of the Act of 1879. The effect of these sections, it would seem, is to make the special provisions of the Indictable Offences Act, 1848, ss. 11-15, as to backing English warrants in Ireland and Irish warrants in England (which apply also as between England and Scotland, England and the Isle of Man, England and the Channel Islands, as well as between Ireland and Scotland) applicable: if so, the part of sec. 6 of the Act of 1881, which applies to endorsing and execution of warrants to enforce bastardy orders, will have been superfluous, because the process already existed; and it follows that the process is available also as between England, Ireland, the Isle of Man, and the Channel Islands. There is no decision of the Courts upon this question, but an official letter of the Home Office of the 13th February 1896 (see 60 J. P. 267) shows that in that department the view is taken that bastardy orders can be so enforced. (See "Issue of Summons and Execution of Warrants in Bastardy out of the Jurisdiction," in Lushington's *Affiliation and Bastardy*, and an article in 60 J. P. 99.)

Enforcement of a Bastardy Order.—The power to enforce is given in sec. 4 of the Act of 1872. An order may be enforced during the pendency of the appeal, after a lapse of the month limited by sec. 4 of the Act of 1872 (*Kendall* v. *Wilkinson*, 1855, El. & Bl. 680; 24 L. J. M. C. 89; 3 C. L. R. 668; 1 Jur. (N. S.) 538; 24 L. T. (O. S.) 309; 3 W. R. 234).

An order can be enforced against the putative father notwithstanding that the mother since the order has married a man able to maintain the child (*Sotheron* v. *Scott*, 1881, 6 Q. B. D. 518; 50 L. J. M. C. 56; 44 L. T. 522; 45 J. P. 423; 29 W. R. 666; *Hardy* v. *Atherton*, 1881, 7 Q. B. D. 264; 50 L. J. M. C. 105; 44 L. T. 776; 45 J. P. 683; 29 W. R. 788); but doubt has arisen whether the justices are bound to enforce on application being made to them, or whether the word "may" in sec. 4 of the Act of 1872 leaves them a discretion to enforce the order. The question was discussed in *Davies* v. *Evans*, 1882, 9 Q. B. D. 238; 51 L. J. M. C. 132; 46 L. T. 418; 46 J. P. 471; 34 W. R. 548; and there was a difference of opinion in the Court, Huddleston, B., holding that the justices are bound to enforce an order, Grove, J., holding that they had a discretion; but as the appellant supported the contention that the justices must enforce the order, the difference of judicial opinion resulted in effect in the decision of the justices that they had a discretion remaining undisturbed; no appeal lay ("this being a criminal case": *per* Grove, J., S. C. at p. 136 of 51 L. J. M. C.), and the question does not appear to have been raised since in the High Court.

An agreement by the woman to release the putative father from all future liability in consideration of a sum paid had already been held to be no bar to the making of an order (*Follit* v. *Koetzow*, otherwise *Tollit* v. *Kortzow*, 1860, 2 El. & El. 731; 29 L. J. M. C. 128;

2 L. T. (N. S.) 178; 6 Jur. (N. S.) 651; 24 J. P. 612; 8 W. R. 432); on the same principle it was decided that the existence of such an agreement is no bar to the enforcement of the order (*Griffith* v. *Evans*, 1882, 30 W. R. 427; 46 L. T. 417), even when the child has not become chargeable. It would seem to follow that the justices may enforce the order even though the woman in Court seeks to withdraw her application for its enforcement. In *Follit* v. *Koetzow*, *ut sup. cit.*, Cockburn, C.J., pointed out the peculiar character of proceedings in bastardy: it was left to the choice of the mother to come forward and obtain an order, yet when once the order was obtained, it existed not for the benefit of the mother, but for that of her child; the mother could not annul the order by any such agreement, yet such an agreement was not void in law, but might be taken into consideration in making the order. For such an agreement is not void for want of consideration (*Smith* v. *Roche*, 1859, 6 C. B. (N. S.) 223; 28 L. J. (C. P.) 236; 5 Jur. (N. S.) 918; 33 L. T. (O. S.) 123; 23 J. P. 312; 7 W. R. 413). Whether such an agreement ought to be taken into consideration by the justices upon application to enforce an order depends upon the wider question whether they have any discretion to enforce an order or not (see *Davies* v. *Evans*, *ut sup. cit.*); having regard to the result of that case, it may be assumed that justices may take into consideration any such agreement, if it were *bonâ fide;* the state of things is not likely to arise often, because under such circumstances an attempt would seldom be made to enforce such an order. The justices at Walsall (in June 1905), acting on the authority of *Griffith* v. *Evans*, enforced an order by committal of the putative father, though he produced in Court such an agreement made between him and the mother, and though the mother sought in open Court to withdraw her complaint (not reported). The view taken there seems to be that the public have an interest in the enforcement of a bastardy order, and that after it has once been made it cannot be got rid of by any private arrangement.

The putative father is not excepted from imprisonment, under sec. 4 of the Act of 1872, by the Debtors Act, 1869, 32 & 33 Vict. c. 62; lack of means is no defence. But since the Summary Jurisdiction Act, 1879, by sec. 54 thereof, is made to apply to such imprisonment "in like manner as if such order were a conviction on information," imprisonment discharges the defendant from all liability in respect of sums due under the bastardy order down to the date of the enforcement (*per* Abbott, C.J., *Robson* v. *Spearman*, 1820, 3 B. & Ald. 493). Neither a composition under the Act of 1890, nor a discharge in bankruptcy of the putative father, will operate to release him from any liability under a bastardy order (see Bankruptcy Act, 1890, 53 & 54 Vict. c. 71, s. 3 (12) and s. 10).

The death of the putative father prevents any enforcement of the order after his death; *semble*, that an action will not lie against his personal representatives for sums already due or to become due for the maintenance of the child, "for where a statute creates an obligation and enforces performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner" (*Doe dem. Bishop of Rochester* v. *Bridges*, 1831, 1 B. & Ald. 837, 839; 9 L. J. K. B. 115; *Stevens* v. *Jeacocks*, 1848, 17 L. J. (N. S.) Q. B. 163).

The process of enforcing the order is to be found in sec. 4 of the Act of 1872 and the various applicable sections of the Summary Jurisdiction Acts. (See *supra, Application of the Summary Jurisdiction Acts.*)

The procedure therein provided must be strictly followed. The period of the imprisonment is to be in accordance with the scale given in sec. 5 of the Summary Jurisdiction Act, 1879; the amount, which will determine the length of the imprisonment, will be the total arrears under the original order and the costs thereof, but will not include the costs of enforcing the order, because sec. 54 of the Act of 1879 only applies the Act to the non-payment of the sums due under the original bastardy order, without the subsequent costs. Rule 27 of the Summary Jurisdiction Rules, 1886, does not apply to process of enforcement of a bastardy order, and a constable therefore has no power to receive the amount and discharge the prisoner.

The special provisions of the Army Act, 1881, s. 145, must be observed when the putative father is a soldier in the regular forces. A copy of the order must be sent (the section does not say by whom) to the Secretary of State, and if it is so sent, the Secretary of State may order a portion, not exceeding sixpence, of the daily pay of a non-commissioned officer not below the rank of sergeant, and not exceeding threepence of the daily pay of any other soldier, to be deducted from such daily pay; the amount is to be appropriated in liquidation of the sum adjudged to be paid by such order (subs. 2); it would seem that payment of the sum so appropriated operates as a full discharge of the liability during the time that the putative father remains a soldier in the regular forces. By subs. 1, execution in respect of any such liability or of any order or decree in respect of maintenance cannot issue against the person, pay, arms, ammunition, equipment, instruments, regimental necessaries or clothing of such soldier: otherwise, he is liable "to the same extent as if he were not a soldier" (subs. 1); no process whatsoever can issue against a soldier after he is under orders for service beyond seas (subs. 3). It is clear, therefore, that enforcement is limited to the means provided by subs. 2.

An English order may be endorsed and enforced in Scotland, and a Scotch decree in England, under the provisions of sec. 6 of the Summary Jurisdiction (Process) Act, 1881, by endorsement, in the manner provided by this Act with respect to process of the Court of Summary Jurisdiction; the reference is to sec. 4. This machinery is limited in bastardy to the enforcement of the order, and is not available for the commencement of affiliation proceedings. By the same section "any bastardy order may be registered in the books of a Sheriff-Court in Scotland, and thereupon a warrant of arrestment may be issued in like manner as if such order was a decree of the said Sheriff-Court." No express statutory provision exists which enables an English order in bastardy to be enforced in Ireland, the Isle of Man, or the Channel Islands; it is a moot question whether such an order may be enforced in either of those islands by virtue of sec. 54 of the Summary Jurisdiction Act, 1879, if it is endorsed according to the provision of sec. 3 of the Summary Jurisdiction Act, 1848. (See *Application of the Summary Jurisdiction Acts to Affiliation Proceedings, supra.*)

Punishment for Disobedience of the Order.—An indictment will lie for disobedience of a bastardy order: the offence of disobeying an order of justices being a misdemeanor at common law. (See Chitty's *Criminal Law*,

279; Archbold's *Criminal Pleading*, 1905, 23rd ed., pp. 1087, 1088; 4 Went. 227.) The cases are *R.* v. *Fearnley*, 1786, 1 T. R. 316; *R.* v. *Cant*, 1842, Car. and M. 521; 2 Moo. C. C. 271; *R.* v. *Brisby*, 1849, 1 Den. 416; 2 Car. and Kir. 962; *R.* v. *Ferrall*, 1850, 2 Den. 51; 20 L. J. M. C. 39. In the last-mentioned case the Court somewhat reluctantly, as appears from the judgment delivered by Pollock, C.B., held that the indictment lay; they also held that the offence was a "criminal matter" within the exception in statutes 11 & 12 Vict. c. 11, s. 52, and 12 & 13 Vict. c. 10, s. 52 (Mutiny Act), and that, therefore, the fact of the defendant being a soldier was no defence. From the same case it would appear that to support the indictment it is not necessary to show that the defendant had the means to pay; it seems, also, that proof of inability to pay affords no defence, but no decision was given on these last two points. A form of indictment is set out at length in Wentworth's *Pleadings*, 1797, vol. iv. p. 227; Pritchard's *Quarter Sessions;* and in the reports of *R.* v. *Brisby* and *R.* v. *Ferrall, ut sup. cit.*

The punishment, according to the general principles applicable to those common law misdemeanors for which no special punishment is provided by any statute, may be a fine, or imprisonment, or both fine and imprisonment; in substitution or in addition the offender may also be ordered to enter into recognisances to keep the peace and be of good behaviour for a specified time.

Trials for the misdemeanor are of very rare occurrence, and there have been, in all probability, none in recent years.

In delivering the judgment of the Court in *R.* v. *Brisby, ut sup.*, Pollock, C.B., said that, speaking for himself, he could not but think it very odd that an order of sessions for the payment of money should be the subject of an indictment, when the orders of other and higher Courts cannot be so enforced.

[*Books.*—Martin's *Law of Maintenance and Desertion and Orders in Bastardy;* Saunders' *Law and Practice of Affiliation;* Lushington's *Law of Affiliation and Bastardy;* Stone's *Justices' Manual;* Archbold's *Quarter Sessions;* Pritchard's *Jurisdiction, Practice and Procedure in Quarter Sessions*, 2nd ed., 1904, by J. B. Matthews and V. G. Milward.]

FORM OF NOTICE OF APPEAL.

TO WIT. } To and , Esquires, two of His Majesty's justices of the peace for the county of , acting in and for the Petty Sessional Division of the said county, and to Mr. , their clerk, and to , of .

Take notice, that of intends to enter into and prosecute an appeal at the next Quarter Sessions of the Peace, to be holden at , in and for the county of , against a certain order in bastardy, bearing date on or about the day of , wherein he was adjudged to be the putative father of a certain bastard child born of you the said , and was ordered to contribute to the relief and

maintenance and education of the said bastard child, and to pay certain expenses and costs as in the order aforesaid mentioned.

And, further, take notice, that the general grounds of the said appeal are as follows:—

1. That the said is not the father of the said bastard child, and that he was wrongly adjudged to be the putative father thereof.

2. That no corroboration of the evidence of the said was given in any material particular within the meaning of the statute.

3. That the corroboration (if any) of the evidence of the said was not sufficient to justify the making of the said order.

4. That the said adjudication and order were made contrary to the evidence.

5. That the said justices were wrong in excluding evidence tendered on behalf of the said , and to be given by one .

6. That the said order is bad in law.

7. That the said order is bad upon the face of it.

Affinity.—Affinity is sometimes said to be of three kinds: (1) *Direct*, or that which subsists between the husband and the wife's blood relations, or between the wife and the husband's blood relations; (2) *Secondary*, or that which subsists between the husband and the wife's relations by marriage; and (3) *Collateral*, or that which subsists between the husband and the relations of the wife's relations. The affinity which bars marriage is only of the first or direct kind. The kindred of the husband are not of affinity to the kindred of the wife, for affinity, as respects the wife's kindred, relates only to the husband, and terminates with him; and, as respects the husband's kindred, relates only to the wife, and terminates with her.

By 32 Hen. VIII. c. 38, it was enacted that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees."

Archbishop Parker, in 1563, acting under royal authority, set forth the "Table of Kindred and Affinity," which is generally printed with the Book of Common Prayer, though not a part of the "book annexed" to the Caroline Act of Uniformity (14 Car. II. c. 4). The table has full synodal authority by Canon 99 of 1603, which orders it to be publicly set up in churches. It has always been regarded as conclusive by the temporal Courts (*Hill* v. *Good*, 25 Car. II., Vaug. 302; *R.* v. *Chadwick*, 1847, 11 Q. B. 205; 75 R. R. 335). Before 31st August 1835, when the Marriage Act, 1835, 5 & 6 Will. IV. c. 54, better known as "Lord Lyndhurst's Act," passed and came into operation, the state of the law was as follows: Any *de facto* marriage was presumed to be good, and could only be declared null and void by the proper ecclesiastical Court during the lifetime of both parties. The reason of this limitation, which the temporal Courts enforced by prohibition, was that, as the Ecclesiastical Court could only act *pro salute animæ*, it would not be

allowed to proceed merely to bastardise the innocent issue. But it could, nevertheless, sentence the surviving partner of the incestuous union to penance (*Ray* v. *Sherwood*, 1836, 1 Curt. 193). By the Marriage Act, 1835, s. 2, all marriages thereafter celebrated between persons related within the prohibited degrees, whether of consanguinity or affinity, are "absolutely null and void to all intents and purposes whatsoever."

Notwithstanding this enactment, the High Court will grant a decree of nullity on the application of one of the parties (*Andrews* v. *Ross*, 1888, 14 P. D. 15). The capacity to contract marriage depends on the law of the party's domicile; and therefore persons of English domicile related within the prohibited degrees cannot, by going through a marriage ceremony in a country where such a marriage is legal, contract a valid marriage (*Brook* v. *Brook*, 1861, 9 H. L. C. 193; 11 E. R. 703). [A marriage, however, between parties related within the prohibited degrees in a country where such a marriage is legal, is valid in England provided the parties are domiciled in the country where the marriage takes place (*In re Bozzelli's Settlement*, [1902] 1 Ch. 751). This is subject to the proviso that the marriage is not regarded as incestuous by the general consent of Christendom and is not polygamous (*Hyde* v. *Hyde*, 1866, L. R. 1 P. & D. 130; *In re Bethell*, 1888, 38 Ch. D. 220; *Brinkley* v. *Attorney-General*, 1890, 15 P. D. 76).]

Conversely, it would seem that a marriage, duly contracted according to the *lex loci contractûs*, between persons who, by the law of their domicile, are under no incapacity to intermarry, will be held good in England, although the English law imposes an incapacity. See *Sottomayer* v. *De Barros*, 1877, 3 P. D. 1. But the child of such a marriage could not inherit real estate in England. See *Fenton* v. *Livingstone*, 1859, 3 Macq. H. L. 497. These questions are of practical importance, owing to the legislation in some civilized countries (including several British dependencies) of certain marriages prohibited in England on the ground of affinity, and of the frequent attempts, since the year 1849, to legalise one particular form of such marriages in England [viz., marriage with a deceased wife's sister. Marriage with a deceased wife's sister is valid in New South Wales (Act 15 of 1899, s. 18); Queensland (Act 25 of 1878); Tasmania (Act 7 of 1873); Victoria (Act 1166, 1890, s. 18); Western Australia (No. 11 of 1894, s. 32); Barbados (Act 15 of 1891, art. 18); British Guiana (No. 25 of 1901, art. 28 (3); also with a deceased husband's brother); in Canada (Dom. Act, 45 Vict. c. 42; also with the daughter of a deceased wife's sister (c. 36 of 1890)); Cape Colony (No. 40 of 1892, art. 2); Gold Coast Colony (No. 14 of 1884, s. 33; and also deceased wife's niece); Lagos (No. 14 of 1884, art. 35); Mauritius (No. 26 of 1890, art. 50); Natal (No. 45 of 1898, art. 2); New Zealand (No. 19 of 1904, s. 44; or husband's brother (s. 45)). In many of the Colonies the English prohibited degrees are in force]. Mere illicit connection does not constitute affinity (*Wing* v. *Taylor*, 1861, 2 Sw. & Tr. 278).

[See Pollock and Maitland, *History of English Law*, ii. 385; Gibs. *Codex*, i. 408; Phillimore, *Eccl. Law*, 2nd ed., 563; Hammick, *Marriage Law of England*, 31; Dicey, *Conflict of Laws*, 626; Bishop, *Marriage and Divorce*, i. s. 730.]

Affirmation (Historical).—For practice, see OATH. The right

to affirm in lieu of taking an oath "in all places and for all purposes where an oath is or shall be required by law," was conferred by the Oaths Act, 1888, 51 & 52 Vict. c. 46, upon "every person objecting to be sworn and stating as the ground of such objection that he has no religious belief, or that the taking of an oath is contrary to his religious belief." This Act provides further that if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

The passing of this Act was a new departure on the part of the legislature. Affirmations in lieu of oaths appear to have been first introduced in the year 1696 by the statute 7 & 8 Will. III. c. 34, which allowed Quakers to affirm in lieu of taking an oath. But this relief was only granted in respect of oaths to the Government, and on public occasions, and did not extend to allowing members of that society to give testimony in criminal matters without taking the oath (Jacob's *Law Dict.*, tit. "Affirmation"). This restriction was removed in 1833 by the statutes 3 & 4 Will. IV. cc. 49, 82, by which Quakers, Moravians, and Separatists were accorded the general permission to give evidence on affirmation in lieu of oath, subject to the usual penalties for giving false evidence; and in 1838 this right was further extended to persons who had been, but who had ceased to be, Quakers or Moravians (1 & 2 Vict. c. 77). This relief was again extended by sec. 20 of the Common Law Procedure Act, 1854, to "any person called as a witness, or required to make an affidavit or deposition (who) shall refuse or be unwilling from alleged conscientious motives to be sworn." This enactment was applied to every Court of civil judicature in England and Ireland (s. 103), and was retained until its repeal by the Oaths Act, 1888. It would seem that the term "conscientious objection" in its natural interpretation as the basis of the right to affirm was sufficient to cover the case of persons who had no religious belief, for the relief of whom the Oaths Act was passed. But it does not appear to have been so understood or acted upon, and until 1888 persons who objected to taking an oath on that ground were not permitted to affirm to documentary evidence. The Evidence Further Amendment Act, 1869, 32 & 33 Vict. c. 68, as amended by the Evidence Amendment Act, 1870, 33 & 34 Vict. c. 49, allowed a witness in Court, or other place where evidence was given *vivâ voce*, to "solemnly promise and declare," but this did not apply to documentary evidence. It remained for the Oaths Act, 1888, to remove entirely the disability of a person having no religious belief from giving evidence by written deposition, except upon oath, and to substitute an affirmation for an oath for all purposes.

A somewhat curious comment upon the wave of excitement and apprehension which agitated the religious community at the time of the introduction and passing of the Oaths Act in 1888 is presented by the fact that ever since it was passed, down to the present time, it has been an occurrence of extreme rarity for a witness in Court, or on testifying to documentary evidence, to claim the right to affirm in lieu of taking an oath on the ground that he has no religious belief. Experience has shown that, as a matter of fact, the Oaths Act deprived a person so situated of more than it gave him, by imposing on him the obnoxious

necessity of publicly stating that he had no religious belief in order to be relieved from taking an oath; while, by repealing sec. 20 of the Common Law Procedure Act, 1854, it deprived him of the right to such relief on the mere statement that he was "unwilling from conscientious motives to be sworn," a right to which, according to the actual words of that section, he appears to have been entitled for over thirty years before the Oaths Act was passed.

For forms, and practice as to taking affirmations, see OATH; OATHS.

Afforatus.—Blount and other authorities explain this word to mean appraised or valued, and cite by way of example things vendible in a fair or market. In old charters the word is also sometimes found in connection with words signifying penalties or fines in the sense of liquidated or ascertained in respect of amount.

Afforciare.—To add to, increase, or make stronger, especially of enlarging the number of witnesses or jurymen when those called happen to be nearly equally divided in opinion or contrary in their oaths. See Bracton, lib. 4, c. 19. *Afforciamentum curiæ* is the summoning of a Court on some solemn or special occasion.

Affray is the fighting of two or more persons in a *public* place to the terror (*à l'effroi*) of the lieges. It is an indictable misdemeanor, for which no specific punishment is limited by statute (Stephen, *Dig. Crim. Law*, 6th ed., art. 74; 3 Co. Inst. 158; Hawk., P. C., bk. ii. s. 63; 1 Russ. on *Crimes*, 6th ed., 587; Arch. Cr. Pl., 23rd ed., 1107; Mayne, *Criminal Law of India*, 1896, 491). Prosecutions for the offence are rare, because upon the same facts the persons concerned usually render themselves liable to prosecution for ASSAULT (*q.v.*), RIOT (*q.v.*), or UNLAWFUL ASSEMBLY. See ASSEMBLY, UNLAWFUL. A private person is entitled (Hawk., P. C., bk. i. c. 63, s. 11), and constables and justices are bound to interfere to put a stop to an affray (see 1 Russ. on *Crimes*, 6th ed., 589-592, and *R.* v. *Pinney*, 1832, 3 St. Tri. N. S. 11, as to the duties and liabilities of justices where the public peace is disturbed). Where a single person goes armed in a public street, without lawful occasion, and so acts as to be a nuisance and terror to the lieges, he may be convicted either under the statute of Northampton, 2 Edw. III., or for a common-law nuisance (*R.* v. *Meade*, 1903, 19 T. L. R. 540).

Affreightment.—Affreightment is a contract by which a shipowner undertakes to carry goods in his ship for reward. The person for whom the goods are carried is called the *freighter*, and the sum which he pays for their carriage is called the *freight*. The contract may be made (1) between the shipowner and one person who hires the use of the ship, for the purpose of carrying his own goods or those of other persons; or (2) between the shipowner and each of a number of persons who ship goods in that particular ship. In the former case, the contract is generally expressed in a *charter-party*, and the ship is called a *chartered* ship, but the contract of affreightment does not require a charter-party to be made (*Rederi Aktiebolaget Nordstjernen* v. *Salvesen*, 1903, 6 F. 64); in the latter, the ship is called a *general ship*, and the contract is generally expressed in writing, and called a *bill of lading*. These two contracts are considered in detail under CHARTER-PARTY and BILL OF

LADING. The present article only deals with the general principles common to both contracts of affreightment alike, such as (*a*) the liability of a shipowner who receives goods for carriage in his ship without making any express conditions; (*b*) the law governing both contracts of affreightment; (*c*) the rules of construction applicable to all express contracts of sea-carriage.

(*a*) *Liability of Shipowner apart from Express Conditions.*—It is hardly necessary to say that in practice the shipowner's liability is chiefly determined by a contract, limiting very narrowly, by its express exceptions, the contract which the law would imply from the fact of goods being accepted for carriage in a ship. These exceptions are best considered under their respective contracts. But, as no number of express exceptions can be exhaustive, the liability of a carrier by sea must at times depend on what is his legal position, unqualified by special conditions. That position depends on the common law and various statutes.

The liability of a shipowner or shipmaster at common law is thus stated by Lord Holt (in *Coggs* v. *Bernard*, 1703, 1 Smith's L. C.): "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods in all events. And this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged, 26 Car. II., in the case of *Morse* v. *Slue*, Raym. (Ld.) 220. The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the King." In *Morse* v. *Slue* (1671), goods which had been shipped in a vessel lying in the Thames, to be carried to Cadiz, were forcibly taken out of her by robbers before the ship sailed, and Chief-Justice Hale held the master liable for them, although no negligence was proved against him, and he had the usual number of men to guard the ship, saying that there was no difference between his liability in that case and that of a common carrier. The ship seems to have been a general ship; as it was in the case of *Barclay* v. *Cuculla y Gama*, 1784, 3 Doug. K. B. 389, where, under the same circumstances as those in *Morse* v. *Slue*, Lord Mansfield gave a similar judgment; while in *Dale* v. *Hall*, 1750, 1 Wills. 281, where a shipmaster or keelman who carried goods for hire from port to port was held liable for damage to goods done on the voyage, not due to any negligence of his, it is not clear if there were other shippers besides the plaintiff. From the above authorities, confirmed in *Nugent* v. *Smith*, 1875, 1 C. P. D. 25 and 427, there is no doubt that the owner of a general ship is either a common carrier or has the same liability as one, if his ship plies regularly between fixed places and habitually carries the goods of all comers, whether within or without English waters, and probably is so, if his ship is announced to carry goods for hire, for all persons who may offer on a particular voyage, *i.e.* is put up as a general ship.

Whether the owner of a chartered ship, *i.e.* one carrying goods for one person exclusively, has the same liability as the owner of a general ship, is a disputed question, and there have been conflicting judicial opinions. The only case in which the point can be said to have directly arisen is *Liver Alkali Co.* v. *Johnson*, 1874, L. R. 9 Ex. 338; there a

barge-owner let out his vessels for conveyance of goods to any customer who applied to him; each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage; the owner did not ply between fixed *termini*, but the customer fixed in each case the points of arrival and departure; and it was decided that the owner was liable for the loss of goods as a common carrier. Blackburn, J., in that case said: "It is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries lading in different parcels for different people," adding that the liability of a lighterman was expressly recognised as being the same as that of a common carrier. Brett, J. (afterwards Lord Esher, M.R.), stated it as his opinion, on a review of the authorities, that shipowners, though not common carriers, yet by custom, *i.e.* the common law of England, have the same liability. "Every shipowner who carries goods for hire in his ship, whether by inland navigation, or coastways, or abroad, undertakes to carry them at his own risk, the act of God and the Queen's enemies alone excepted, unless by agreement between himself and the particular freighter on the particular voyage he limits his liability by further exceptions." In *Nugent* v. *Smith*, *ante*, he repeated this opinion: "Every shipowner or master who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, subject by implication, by the common law of England adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God and the Queen's enemies. It is not only such shipowners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward." When this case was taken to the Court of Appeal, Cockburn, C.J., dissented emphatically from the theory and doctrine put forward by Brett, J., saying that all jurists who treated of this bailment carefully distinguished between the common carrier and the private ship, and that he disapproved of the decision in *Liver Alkali Co.* v. *Johnson*, *supra*. Historically, it would seem that this liability of carriers is derived from the early English law and not from the Roman law (Holmes, *Common Law*, lect. v.). If the shipowner has not the liability of a common carrier, because his ship is "private," he only undertakes to exercise ordinary care and diligence in carrying the goods, and is only liable for negligence of himself or his servants. But in *Hamilton* v. *Pandorf*, 1886, 17 Q. B. D. 683, Bowen, L.J., says: "By the common law of this country, which in this respect is stricter than either the civil law or the law of many continental nations, a carrier at sea was liable for loss or damage to goods, except only in the event of accidents caused by the act of God or of the King's enemies." It seems, therefore, that the balance of authority and principle is in favour of the view taken by Lord Esher (see Willes, J., in *Notara* v. *Henderson*, 1872, L. R. 7 Q. B. 236; Abbott (14th ed.), pp. 484, 580, 581; Carver, ss. 2-5). This liability as of an insurer in the absence of contract may, however, be excluded by the custom of a particular locality; *e.g.* for Thames lightermen (*Thomas* v. *Brown*, 1899, 4 C. C. 186).

The exceptions to the strict rule of liability of the shipowner implied by common law are the following:—(*a*) Loss caused by the *act of God* (*q.v.*), which is a "mere short way of expressing this proposition—a

common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him" (James, L.J., *Nugent* v. *Smith*, above), such as lightning, storm (Martin, B., *Oakley* v. *Portsmouth and Ryde U.S.P.C.*, 1856, 25 L. J. Ex. 99), or frost (Carver, ss. 7, 8, 9, and 10; and see *The Barcore*, [1896] P. 294). (*b*) Loss caused by the *King's enemies*, *i.e.* any loss caused by the act of States or peoples of war with this country in the case of a British ship, and where the ship is foreign probably loss caused by enemies of the State to which the ship belongs. Both this and the foregoing exception are usually expressly mentioned in the contract of affreightment (and perhaps this is necessary if the shipowner is not a common carrier, Willes, J., *Lloyd* v. *Guibert*, 1865, L. R. 1 Q. B. 121), and an express exception of *King's enemies* has been held to exclude enemies of a foreign State to which the ship belonged (*Russell* v. *Niemann*, 1864, 34 L. J. C. P. 10). (*c*) Loss caused by the inherent defect of the goods themselves, *e.g.* a horse injured by its own timidity (*Nugent* v. *Smith*, above); or owing to the defective packing of the goods, or the dangerous nature of the goods, of which the shipowner has not notice (*Hutchinson* v. *Guion*, 1868, 28 L. J. C. P. 63), and it has been decided that it makes no difference whether the shipper of the goods knows of it or not (*Brass* v. *Maitland*, 1856, 26 L. J. Q. B. 49); but there are judicial and other opinions that the shipper should not bear the loss where he is ignorant of the defective or dangerous nature of his goods (*Acatos* v. *Burns*, 1878, 3 Ex. D. 282; Carver, ss. 277, 278). (*d*) Loss by jettison, or voluntary sacrifice of goods for the general safety of the adventure (*Mouse's Case*, 1608, 12 Coke, 63), though the shipowner contributes in general average, unless they are deck cargo and carried at merchant's risk (*Roy. Ex. Shipping Company* v. *Dixon*, 1887, 12 App. Cas. 11). None of these exceptions will, however, protect the shipowner if he has not "taken reasonable care to avoid the cause of loss, or guard against its possible effects, or arrest its consequences" (Carver, s. 16); for, in spite of the exceptions, his contract is to carry with reasonable care (*The Xantho*, 1887, 12 App. Cas. 510, Lord Herschell, approving Willes J.'s statement in *Grill* v. *General I. S. C.*, 1866, L. R. 1 C. P. 612; *Hamilton* v. *Pandorf*, 1887, 12 App. Cas. 526, Lord Watson). Thus a fire arising by act of man, which spread from a distance to the place where the goods were and destroyed them, is not an act of God, though fire naturally caused is (*Forward* v. *Pittard*, 1785, 1 T. R. 27; 1 R. R. 142, Lord Mansfield); nor is a frost which made a boiler burst because it had been carelessly filled with water the day before (*Siordet* v. *Hall*, 1828, 4 Bing. 607; 29 R. R. 651). Similarly, a master is bound to avoid the public enemies of his country; and is justified in delaying or putting into a neutral port for safety, or the exception "King's enemies" will not protect him (*The Teutonia*, 1870, L. R. 4 P. C. 171). Thus he is liable to shippers of goods in damages for delay caused by arrest of the ship for shipping other goods intended for the King's enemies under bills of lading, excepting liability for loss or damage occasioned by restraint of princes, on the ground that he cannot rely upon an exception to excuse him from the consequences of a peril which his own negligence has contributed to bring about (Collins, M.R., *Dunn* v. *Currie*, 1901, 17 T. L. R. 739; [1902] 2 K. B. 614). Though the shipowner is not liable for loss caused by

inherent defect of the goods, yet, if the consequences of that defect have been aggravated by the way in which he or his agents have stowed them, he will be responsible (*The Freedom*, 1869, L. R. 3 P. C. 594), although the shipper knows and assents to that method of stowage (*Hutchinson* v. *Guion*, *ante*), unless the stowage is well done and in a way approved of by the shipper, and the master is reasonably ignorant of the effect likely to be produced by such stowage (*The Helene*, 1866, L. R. 1 P. C. 239). So, if he has notice of the defective packing of goods, he may be bound to remedy it so far as he reasonably can, if he chooses to carry them on; and if he insists on carrying on to its destination a cargo which is found at an intermediate port to be deteriorating from sea damage, instead of landing it and taking steps to stop the damage, he is liable for the increased damage so caused (*Notara* v. *Henderson*, 1872, L. R. 7 Q. B. 236); and if he has notice of the dangerous nature of the goods which he accepts on board his ship, loss arising thence must be made good by the shipowner (*Acatos* v. *Burns*, *ante*; Carver, s. 279). This rule applies to express exceptions as much as to implied ones.

The shipowner also impliedly warrants that the ship is seaworthy at the beginning of the voyage, *i.e.* is fit in structure, condition, and equipment for carrying the cargo on the agreed voyage in safety (*Steel* v. *State Line S.S. Co.*, 1877, 3 App. Cas. 72); *e.g.* if the cargo is one of frozen meat, the refrigerating machinery must be in proper condition (*The Maori King*, [1895] 2 Q. B. 550). This warranty is not "because he is a common carrier (*i.e.* only where he is such), but because he is a shipowner" (*Kopitoff* v. *Wilson*, 1876, 1 Q. B. D. 382); and it extends even to latent defects in the ship not discoverable by careful examination, though everything reasonable has been done to make her seaworthy (*The Glenfruin*, 1885, 10 P. D. 103). If a seaworthy ship under charter is rendered unseaworthy by improper loading and ballast, for which the shipowner is responsible, he is liable (*City of Lincoln* v. *Smith*, [1904] A. C. 250). An exception of latent defects does not exclude the implied warranty against obvious defects at the beginning of a voyage (*S.S. Waikato* v. *New Zealand S. C.*, [1898] 1 Q. B. 645; [1899] 1 Q. B. 46; 3 C. C. 109; 4 C. C. 10). The warranty does not apply to any time subsequent to the ship's sailing (*The Rona*, 1884, 51 L. T. 28), after which the shipowner is only liable for loss arising from unseaworthiness due to a cause for which he is liable; so that he will be liable (1) when the ship is unseaworthy at the beginning of the voyage (*Gilroy* v. *Price*, [1893] App. Cas. 56; see *The Pentland*, 1897, 13 T. L. R. 430), and, if the voyage is in stages, at the beginning of each stage (*Thin* v. *Richards*, [1892] 2 Q. B. 141; *The Vortigern*, [1899] P. 140; 4 C. C. 152; 8 Asp. 523). The warranty extends to the safe condition of a bullion-room in a steamer carrying gold (*Queensland National Bank* v. *P. & O. S. N. C.*, [1898] 1 Q. B. 567, and see *The Prinz Heinrich*, 1897, 14 T. L. R. 48); ballast (*Weir* v. *Union S.S. Co.*, [1900] App. Cas. 525); water for cattle (*Vallée* v. *Bucknall*, 1900, 16 T. L. R. 362); passengers' luggage (*Upperton* v. *Union Castle S.S. Co.*, [1903] 19 T. L. R. 123). The warranty of seaworthiness may be excluded by contract, but requires express terms to exclude it; *e.g.* incorporating the United States Harter Act to use due diligence to make the ship seaworthy will not do so (*M'Fadden* v. *Blue Star Line*, [1905] 1 K. B. 697; and see *Rowson* v. *Atlantic Transport Co.*, [1903] 2 K. B. 666—defective refrigerating apparatus). It may here be noticed that under the United States Harter Act, 1893,

which has been followed in its main lines by an Australian Act of 1904, a shipowner cannot contract himself out of his obligation to exercise due diligence to properly equip, man, provision, and outfit the vessel, and make her seaworthy and capable of performing her intended voyage, or exclude the obligation of his servants in stowing and delivering the cargo. In the London Rules of Affreightment, drawn by the International Law Association (1893), it was proposed that shipowners should be responsible for loss or damage arising from the vessel being unsuitable for carrying the cargo, or from her being unseaworthy at the beginning of the voyage, as also for loss or damage due to want of reasonable care and skill in loading, stowing, or discharging the cargo (*Report of London Conference*, p. 92). The shipowner is liable (2) when the ship becomes unseaworthy during the voyage from a cause for which he is liable by the contract, whether he has the opportunity to repair it or not (*Worms* v. *Storey*, 1855, 11 Ex. Rep. 427); and (3) when she becomes so owing to a cause for which he is not liable by the contract, if he has the power to repair and fails to do so (*Cohen* v. *Davidson*, 1877, 2 Q. B. D. 455; *Notara* v. *Henderson*, above). The shipowner also impliedly contracts that his ship is in a proper condition to receive the cargo when put on board (*Tattersall* v. *National S.S. Co.*, 1884, 12 Q. B. D. 297; *Rathbone* v. *M'Iver*, [1903] 2 K. B. 378), but this warranty does not continue after the loading (*M'Fadden* v. *Blue Star Line*, [1905] 1 K. B. 697); and that she will prosecute her voyage with reasonable despatch and without unnecessary deviation (*Leduc* v. *Ward*, 1888, 20 Q. B. D. 475; *Scaramanga* v. *Stamp*, 1879, 4 C. P. D. 316, and 5 C. P. D. 295). By the London Rules of Affreightment, ships have liberty to deviate for the purpose of saving life or property, and to tow distressed ships.

There is an implied exception in the shipowner's favour, that the contract is a legally possible one: thus, in the case of a British ship, if the execution of the contract is made illegal or impossible, and loss be caused thereby owing to the act of the British Government, whether it was so originally or only became so afterwards, he is not liable (*Esposito* v. *Bowden*, 1857, 27 L. J. Q. B. 25); and in the case of a foreign ship, he is similarly discharged if an act of the State to which the ship belongs makes the contract illegal (*The Teutonia*, above). But in neither case is he exempted if its performance is prevented by the act of a Government other than his own (*Spence* v. *Chadwick*, 1847, 16 L. J. Q. B. 313), or by unauthorised acts of the officers of his own Government or any other (*Gosling* v. *Higgins*, 1808, 1 Camp. 451; 10 R. R. 726; *Evans* v. *Hutton*, 1842, 12 L. J. C. P. 17).

Certain exemptions are also given to the shipowner by statute. He is not liable for any loss happening without his actual fault or privity, and caused by fire on board his ship, or by robbery or embezzlement, making away with or secretion of any gold, silver, diamonds, watches, jewels, or precious stones put on board, unless the owner or shipper has declared in the bills of lading or other writing the true nature and value of these articles (M. S. A., 1894, s. 502); and a description in a bill of lading as "a box containing about 248 ounces of gold dust" has been held not to be enough to make the shipowner liable (*Williams* v. *African S.S. Co.*, 1856, 25 L. J. Ex. 69). The measure of his total liability is also limited, in case of losses happening to any goods on board the ship without his actual fault or privity, to £8 for each ton of the ship's tonnage; until 1862 the limit had been the value of the

ship and freight (M. S. A., 1854, ss. 504 and 505; altered by M. S. A., 1862, s. 54, now M. S. A., 1894, s. 503); and he is exempted from all liability for damage caused by the actual fault or incapacity of any qualified pilot, acting in charge of a ship where the employment of such pilot is compulsory by law, in collisions between ships (M. S. A., 1894, s. 633). See COLLISION and PILOT. There are special statutory provisions for railway companies which act as sea-carriers, either with their own steamers or those of other persons, and with certain exceptions they are liable for loss of or injury to animals, or any articles, goods or things, in spite of any notice limiting their liability, unless a special contract is made, signed by the owner of the goods, and held by a Court to be just and reasonable. Their total liability is limited, like that of other shipowners; and in the case of animals a certain sum per head is fixed as the limit recoverable, and no excess is recoverable unless declared and additionally paid for by the shipper (Railway and Canal Traffic Act, 1854, s. 7; Railways Regulation Acts, 1868, ss. 14, 16; Railway Clauses Act, 1863, s. 31; Railway Regulation Amendment Act, 1871, s. 12; *Cohen* v. *S. E. R. C.*, 1877, 2 Ex. D. 253; *Doolan* v. *Midland R. C.*, 1877, 2 App. Cas. 92; Railway and Canal Traffic Act, 1888, s. 59). In the case of railways having a special Act previously to 1863, they can exclude their liability for any damage or loss, however caused, like other shipowners (*The Stella*, [1900] P. 161). Section 14 of the Act of 1868, requiring certain conditions to be fulfilled in the course of through booking contracts by a railway company to carry animals, luggage or goods, partly by rail and partly by sea, does not extend to passengers' luggage carried under a free pass excepting the shipowner from liability (*ibid.*).

The Court has power to limit the time within which claims are to be lodged (*The Alma*, 1903, 19 T. L. R. 149; M. S. A., 1894, s. 504, being held to prevail over sec. 3 of Lord Campbell's Act, 1846).

Other statutory provisions, dealing generally with shipment of goods, are the following:—No goods of an explosive or dangerous character are to be shipped without notice of their character given to the shipowner, under a penalty (M. S. A., 1894, ss. 446-450); and a master may require any packages which he suspects contain explosive goods, to be opened or to be searched for, without being subject to any liability (M. S. A., 1894, ss. 446-450; Explosives Act, 1883, s. 8). No ships are to carry timber cargoes on deck during the winter to any port in the United Kingdom from any port outside it, under penalties (M. S. A., 1894, s. 451). Ships carrying grain cargoes in bulk must be loaded with proper precautions to prevent the grain from shifting; and in the case of ships loading grain at a port in the Mediterranean or Black Sea, or on the coast of North America, statutory requirements in this respect must be complied with, and notice given of the kind and quantity of cargo to the British consular officer or customs officer, as the case may be (M. S. A., 1894, ss. 452-456).

(*b*) *Law applicable to Contracts of Affreightment.*—In contracts of affreightment a different rule is followed from that in ordinary commercial contracts on this point. In the latter, the general rule is that the law of the place where the contract was made (*lex loci contractûs*) governs the contract, or, if the contract is made in one country but is to be performed in another, the law of the place of performance decides its effect (*Jacobs* v. *Crédit Lyonnais*, 1884, 12 Q. B. D. 600, Bowen, L.J.,

quoting Lord Mansfield in *Robinson* v. *Bland*, 1760, 1 Black. W. 258; *Chatenay* v. *Brazilian Co.*, [1891] 1 Q. B. 79, Lord Esher, M.R.). With regard to contracts of sea-carriage, on the other hand, if they contain nothing to show, either expressly or by implication, what law they intend to adopt, the established rule is that the *law of the flag* under which the ship sails determines the nature of the shipowner's liability. "The general rule that, where the contract of affreightment does not provide otherwise, then, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most convenient to those engaged in commerce" (*Lloyd* v. *Guibert*, 1865, L. R. 1 Q. B. 123, Willes, J.). In that case the shipowner and ship were French, the charterer was a British subject, and the vessel was chartered at St. Thomas, a Danish island in the West Indies, to load a cargo at Hayti for Liverpool; in the course of the voyage the ship had to put into Fayal, a Portuguese port, in order to repair sea damage, and the master bottomried the ship freight and cargo for the expenses of the repairs. The vessel arrived at Liverpool, but the value of ship and freight fell short of the amount of the bottomry bond, and the cargo-owner had to pay the balance. On his claiming to recover it from the shipowners, it was decided that they were not liable, because by French law (the law of the flag) they were exempted from further liability, though by Danish, Portuguese or English law they would have been liable. Similarly, in *Re Missouri S.S. Co.*, 1889, 42 Ch. D. 321, a contract made in the United States between an American citizen and a British company of shipowners, to carry cattle from Boston to England in an English ship, by which the shipowners were not to be liable for negligence of the master and crew, was held to be governed by English law, which allowed this exception, and not by American law, by which it was void. The law of the flag also determines what authority the contract of affreightment gives to the master over the goods intrusted to him; and "any person who ships goods in a foreign ship is held to impliedly authorise the master of the ship to deal with them according to the law of the flag, unless he limits that authority by express stipulation at the time of the agreement" (*The Gaetano* v. *Maria*, 1882, 7 P. D. 137, Brett, L.J.; *The August*, [1891] Prob. 328). And the law of the flag not only construes the contract as expressed, but it also determines the obligations which are to be implied in it consistently with the written terms. As far as regards the manner of performing the contract is concerned, the law of the place where the contract is to be performed must be complied with; but it is not allowed to alter the express terms of the contract as interpreted by the law of the flag, and excuse its non-performance (*Moore* v. *Harris*, 1876, 1 App. Cas. 331; *Jacobs* v. *Crédit Lyonnais*, above). On the other hand, if the contract contains anything to show, by expression or implication, that the parties did not intend the law of the flag to govern it, but some other law, the latter will be the governing law; *The Wilhelm Schmidt*, 1871, 25 L. T. 34, where Sir Robert Phillimore applied the law of the place of delivery; *Chartered Bank of India* v. *Netherlands India S. N. C.*, 1882, 10 Q. B. D. 521, where an English bill of lading, signed at Singapore for goods belonging to an English shipper carried in a ship flying the Dutch flag, but beneficially owned by Englishmen, was held to be governed by English law, Brett, L.J.,

saying: "It may be true in a sense to say that where the ship carries the flag of a particular country, *primâ facie* the contract made by the captain of that ship is a contract made according to the law of the country whose flag the ship carries. But that is not conclusive. The question what the contract is and by what rule it is to be construed is a question of the intention of the parties, and one must look at all the circumstances and gather from them what was the intention of the parties." And it has also been held by the same learned judge, in the Court of Appeal, that the law of the flag may not be intended to govern the meaning of the contract as between the parties, though it governs the relation of the master to the cargo intrusted to him (*The Industrie*, [1893] Prob. 58).

Where a through contract for the carriage of goods, partly by land and partly by sea, from one country to another, is entered into, perhaps a different law applies to each stage of the contract, the land stage being subject to the law of the country through which it passes, the sea stage to the law of the flag (*Cohen* v. *S. E. R. C.*, above, where it was left an open question whether a contract, made by a passenger taking a ticket at Boulogne for London *viâ* Folkestone, and broken by her luggage being damaged by the railway servants' carelessness in Folkestone harbour, was to be governed by French or English law).

The validity of an ordinary contract, in point of *form* and *capacity of parties*, depends on the law of the place where it was made, while the manner of proving it, and its effect as evidence, depends on the law of the Court which is asked to enforce it (*lex fori*) (*Leroux* v. *Brown*, 1852, 22 L. J. C. P. 1); in a contract of affreightment, it seems that if the law of the flag is satisfied as to the validity of the contract, that is enough (Carver, s. 213).

The *legality* of the contract of affreightment will no less depend on the law which the parties intended to adopt, whether it be that of the flag or any other, but its enforceability will depend on whether it is illegal by the *lex fori*. In England, a contract cannot be enforced, wherever it has been made, if it is forbidden by English law (*Rousillon* v. *Rousillon*, 1880, 14 Ch. D. 369); but it can be enforced (1) if it is valid in the country where it is made, whether valid or void here; (2) if it is valid in the country where it is to be *performed*, whether it be valid or void here, and whether it is *made* here or elsewhere; (3) if it is *void* in the country where it is made, but is valid here (*Missouri Case*, above); and (4) though this is contrary to the principle of international comity, if in the country where it is made or is to be performed, it is illegal by revenue laws (*Planché* v. *Fletcher*, 1779, 1 Doug. 251, Lord Mansfield; *Pellecat* v. *Angell*, 1835, 2 C. M. & R. 311).

(*c*) *Construction of Contract of Affreightment.*—The ordinary rules of construction applicable to commercial contracts govern contracts of affreightment, and may be summarised as follows:—The written contract, if clearly and unambiguously expressed, governs the rights of the shipowner and shipper *inter se*, and its provisions cannot be contradicted or qualified by evidence of what had previously passed between the parties, or of a different intention than that which appears from the document, unless there has been misrepresentation or joint mistake, or the contract is not complete (*Leduc* v. *Ward*, *ante*). If there are indefinite or ambiguous terms in it, evidence is admissible of the meaning probably attributed to them by the parties, which can be inferred from

the relations between the parties, the subject of the contract, and the object which it had in view. The canon for ascertaining the meaning of the words used is that stated by Lord Ellenborough: "They are to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the contract evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense" (*Robertson* v. *French*, 1803, 4 East, 136; 7 R. R. 535). If any word has a technical or special meaning by custom of trade, evidence is allowed to show what it is, though the word has an ordinary unambiguous and actual meaning, and thus geographical terms may be shown to have a commercial meaning not corresponding to their strict geographical meaning (*Birrell* v. *Dryer*, 1884, 9 App. Cas. 353); and where both parties are engaged in the same trade, the presumption is that they meant to use the word in the sense in which it is specially understood in that trade (*Myers* v. *Sarl*, 1860, 30 L. J. Q. B. 16). When evidence of a customary meaning is given, it is for the Court to say whether it is sufficient to go to the jury; the jury find as a question of fact whether the custom is established or not, and "the Court, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of any custom of the trade to any of the words of that contract, has to place the construction upon the contract," *i.e.* decide its meaning (*Bowes* v. *Shand*, 1877, 2 App. Cas. 472, *per* Lord Cairns). Exceptions introduced in favour of a party are construed most strictly against him, and their extent is determined on this principle (*Burton* v. *English*, 1884, 12 Q. B. D. 218; *Norman* v. *Binnington*, 1890, 25 Q. B. D. 477). The meaning of a clause is to be interpreted so as to give effect, if possible, to the whole document; and if one part of it is in conflict with the tenor of the whole, it must be disregarded (*Hydarnes S.S. Co.* v. *Mutual Indemnity Insur. Assoc.*, [1895] 1 Q. B. 500). The intention of the parties is strictly followed; and on this account it has been stated, as a rule, that printed parts of a contract give way to the written parts of it, if not reconcilable with them: but the decisions only apply the rule to policies of insurance (*Robertson* v. *French*, above; *Baumwoll* v. *Furness*, [1891] 2 Q. B. 317, Charles, J.); and the safer rule seems to be, that the whole tenor of the contract decides, and print and writing must be construed together (*Baumwoll* v. *Furness*, [1892] 1 Q. B. 253).

Terms may also be imported into written contracts by law; *e.g.* it is an implied condition in every contract of affreightment that it shall be performed in a reasonable manner and with reasonable diligence, "reasonable" in this connection meaning what is reasonable under the actual circumstances and not under ordinary ones, and being determined by the ordinary practice in the particular trade with reference to which the contract is made. Custom may also import terms into the contract, as well as interpret those expressed in it; and as it is presumed to be known by all persons in the trade, it will bind them though they are actually ignorant of it. Similarly, a person employing an agent to do business for him in a particular trade impliedly authorises him to contract according to the known customs and practices of that trade, but

not if such customs be inconsistent with the real character of the agency, or unfair to the principal, and are only known within that trade (*Robinson* v. *Mollett*, 1869, L. R. 7 H. L. 802; *Bartlett* v. *Pentland*, 1830, 10 Barn. & Cress. 770; 34 R. R. 560). A custom, in order to be importable into a contract, must be (1) reasonable (*Sweeting* v. *Pearce*, 1860, 30 L. J. C. P. 109); (2) certain and universally adopted (*Nelson* v. *Dahl*, 1879, 12 Ch. D. 575); (3) consistent with the contract (*Hayton* v. *Irwin*, 1879, 5 C. P. D. 130), and the words "as customary," added in writing in a charter-party, are not allowed to introduce a custom which is directly at variance with the printed terms (*The Nifa*, [1892] Prob. 411); (4) consistent with law (*Atwood* v. *Sellar*, 1880, 5 Q. B. D. 286); (5) concerned with the subject of the contract (*Phillips* v. *Briard*, 1856, 25 L. J. Ex. 233). Local customs and special local meanings of words cannot be imported into the contract, unless well known to persons engaged in the trade at the place where the contract is made (*Holman* v. *Peruvian Nitrate Co.*, 1878, 5 Sess. Ca., 4th ser., 657; *Buckle* v. *Knoop*, 1887, L. R. 2 Ex. 125). But where a contract is made in one place to be performed at another, it is presumed that it is meant to be performed in a reasonable manner, having regard to the practice prevailing at the latter, whether the parties know that practice or not (*Norden S.S. Co.* v. *Dempsey*, 1876, 1 C. P. D. 654; *Marzetti* v. *Smith*, 1884, 49 L. T. 580). A local custom which may be presumed to be known to an original party to the contract, *e.g.* the original holder of a bill of lading, will not bind a subsequent party to it, *e.g.* an assignee who has no notice of it (*Kirchner* v. *Venus*, 1859, 12 Moo. P. C. 361; 14 E. R. 948; *Buckle* v. *Knoop*, above).

[See Carver, *Sea-Carriage*, 4th ed. [1905]; Scrutton, *Charter-Parties and Bills of Lading*, 5th ed. [1904]; and Abbott, *Shipping*, 14th ed. [1901].]

Africa.—For the law relating to British colonies in Africa, see under COLONY, and special articles, CAPE OF GOOD HOPE, NATAL, ETC. See also COMPANIES, CHARTERED; EX-TERRITORIALITY; FOREIGN JURISDICTION; PROTECTORATE; SPHERE OF INFLUENCE. The territories belonging to other powers, or lying within their spheres of influence, are beyond the scope of this work; but see under EGYPT, the legal position of British authorities in that country.

After.—Where an act has to be done within so many days "after" a given event, the day of such event is not to be reckoned, and the party to do the act has the whole of the last day of the prescribed time in which to do it (*Williams* v. *Burgess*, 1840, 12 Ad. & E. 635; *Robinson* v. *Waddington*, 1849, 18 L. J. Q. B. 250; and *Blunt* v. *Heslop*, 1838, 8 Ad. & E. 577; 47 R. R. 664; see Stroud, *Jud. Dict., in loc.*). A devise "after," or "from and after," a previous interest is not by such words postponed in vesting (1 Jarm. 806 and 816; and see 2 Jarm. 517 and 522).

After-acquired Chattels.—See BILLS OF SALE.

After-acquired Property.—See BANKRUPTCY; BILLS OF SALE; FUTURE AND AFTER-ACQUIRED PROPERTY.

Against the Form of the Statute.—See INDICTMENT.

Against the Peace.—See INDICTMENT.

Age of Discretion.—The period fixed by law when an infant is presumed to become possessed of sufficient understanding to discriminate as to the moral quality of his acts, and therefore to be responsible for crimes committed by him. See AGE, PRESUMPTIONS AS TO.

Age, Presumptions as to.—Conclusive presumptions, that is, those which cannot be rebutted by evidence, are not easily distinguished from rules of substantive law. Thus the capacity of infants to make contracts and deal with their own property is sometimes stated as a presumption of law, that they have not the capacity of mind requisite for such transactions, but may be more conveniently considered as substantive rules of the law of contract and property. (See INFANTS.) So of capacity to commit crime, it may be stated, either as a rule of law or as a conclusive presumption, that an infant under the age of seven years cannot be guilty of felony, or probably of misdemeanor (1 Hale, P. C., 27, 28; Blackstone, iv. 23; Stephen, *Dig. Crim. Law*, art. 26), and that a boy under the age of fourteen years cannot be guilty of a rape or an assault with intent to ravish, or of having carnal knowledge of a girl under the age of thirteen years (1 Hale, P. C., 630; *R.* v. *Groombridge*, 1836, 7 Car. & P. 582; *R.* v. *Phillips*, 1839, 8 Car. & P. 736; *R.* v. *Waite*, [1892] 2 Q. B. 600; 61 L. J. M. C. 187; 67 L. T. 300; 41 W. R. 80; 17 Cox C. C. 554). He may, nevertheless, in circumstances which in an adult would amount to one of these offences, be convicted of a common assault (*R.* v. *Phillips, supra*), or an indecent assault (*R.* v. *Williams*, [1893] 1 Q. B. 320; 62 L. J. M. C. 69; 41 W. R. 332; 5 R. 186). [See also RAPE AND COGNATE OFFENCES.] There is a presumption which may be rebutted by evidence that an infant above the age of seven years and under the age of fourteen years is *doli incapax*. Yet if it appear to the Court and a jury that he was *doli capax* and could discern between good and evil, he may be convicted and punished (Blackstone, iv. 23; Stephen, *Dig. Crim. Law*, art. 27; *R.* v. *Owen*, 1830, 4 Car. & P. 236). It is said that "the evidence of malice which is to supply age should be clear and strong beyond all doubt and contradiction" (Black. *Com.* iv. 24). There is no presumption of law regarding the age at which a woman is past the age of child-bearing. But the Courts have frequently presumed in fact, from the circumstances of particular cases, that women of various ages were past the age of child-bearing. The presumption has been made in the case of a married woman, 49¾ years of age, who had never had a child (*In re Millner's Estate*, 1872, L. R. 14 Eq. 245; 42 L. J. Ch. 44; 26 L. T. 825; 20 W. R. 823); in the case of a childless widow aged 55¼, and a spinster aged 53¾ (*In re Widdow's Trusts*, 1871, L. R. 11 Eq. 408; 40 L. J. Ch. 380; 24 L. T. 87; 19 W. R. 468); in the case of a spinster aged 54 (*Davidson* v. *Kimpton*, 1881, 18 Ch. D. 213; 45 T. L. 132; 29 W. R. 912); and in the case of a spinster aged 53 and 2 months (*Haynes* v. *Haynes*, 1866, 35 L. J. Ch. 303; 14 L. T. 47; 14 W. R. 361); but in *Croxton* v. *May*, 1878, 9 Ch. D. 388; 39 L. T. 461; 27 W. R. 327, the Court refused to presume that a woman of 54½ years who had never had any children, but had only been married three years, was past child-bearing.

Agency (Election).

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Nature of Election Agency.—The common-law doctrines as to the liability of a principal for the acts of his agent have, for the purposes of election law, been very considerably extended. It is clear that agency in election law is not the common-law relation of principal and agent, for a candidate may be responsible for the acts of one acting on his behalf, though the acts be beyond the scope of the authority given, or even in violation of express injunction (*Taunton*, 1874, 2 O'M. & H. 74; *Wakefield*, 1874, *ibid.* 102; *Wigan*, 1881, 4 O'M. & H. 10).

It appears, indeed, to present a stronger analogy to the relation of master and servant than to that of principal and agent (*Norwich*, 1869, 1 O'M. & H. 11; *Westminster*, 1869, *ibid.* 95; *Aylesbury*, 1886, 4 O'M. & H. 62), and the position of principal, in an electioneering sense, has in fact been compared by the judges with that of a man who employs others to race for him (*Westbury*, 1869, 1 O'M. & H. 55; *Tamworth*, 1869, *ibid.* 81; *Coventry*, 1869, *ibid.* 107; *Blackburn*, 1869, *ibid.* 202); or of the new owner of a yacht, who buys it to race in his name, and finds a captain and crew on board, the fact of his consenting to sail with them making them his agents for the purpose of sailing the race, in accordance with the laws of the course (*Wigan*, 1881, 4 O'M. & H. 11), and placing him under a liability in respect of acts done by them, even without his authority or knowledge, or in direct contravention of his orders (see *Westbury*, 1869, 1 O'M. & H. 55).

The common-law maxim, "*Delegatus non potest delegare*," has no application to agency in election law. Any authorised agent of a candidate may, by employing, or knowingly accepting the services of, a worker at the election, constitute such worker an agent of the candidate so as to involve liability for corrupt or illegal acts. The mere non-repudiation by an agent of the services of a person known by him to be a worker may be sufficient to constitute agency (*per* Channell, J., *Great Yarmouth*, 1906).

Liability for Acts of Agent.—The Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, the Act which now governs the trial of election petitions, provides (s. 26) that the principles, practice, and rules on which election committees have heretofore acted in dealing with election petitions are, subject to the rules made under the Act, to be observed, so far as may be, in the case of election petitions under the Act.

Hence the liability of a candidate or member, as regards agency, has, in election petitions since the Act, been determined strictly in accord-

ance with such principles, notwithstanding the rigour of their operation (*Coventry*, 1869, 1 O'M. & H. 107; *Taunton*, 1869, *ibid.* 185; *Blackburn*, 1869, *ibid.* 202). If, therefore, an agent commits a corrupt practice, *e.g.* by bribing voters, without the knowledge or direction of the candidate, the election is nevertheless rendered void, and the candidate will lose his seat. (As to the consequences of corrupt and illegal practices by an agent, see CORRUPT PRACTICES; ILLEGAL PRACTICES; RELIEF.) It should, however, be observed that, in cases involving the liability of a member or candidate to a penalty at law, the common-law principles of agency are applicable in determination of the liability; in such a case, therefore, the knowledge and authority of the principal must be proved (*Felton* v. *Easthope*, 1822, reported in Rogers on *Elections*, 17th ed., vol. ii. p. 384), the law of agency which would subject a candidate to a penalty or an indictment being utterly different from that which would vitiate an election (see *per* Martin, B., *Norwich*, 1869, 1 O'M. & H. 10).

The liability of a candidate for the acts of his agent is very much the same as the liability of a Sheriff for the acts of his Under-Sheriff (*Bewdley*, 1869, 1 O'M. & H. 19), or of a master for the acts of his servant, whether lawful or unlawful, done in the course of his employment, notwithstanding that the particular acts in question may have been expressly prohibited (see *Wigan*, 1869, 1 O'M. & H. 191); for in parliamentary election law it has long been established that where a person has employed an agent for the purpose of procuring his election, he, the candidate, is responsible for the act of that agent in committing corruption, though he himself not only did not intend or authorise it, but even *bonâ fide* did his best to hinder it (*Taunton*, 1869, 1 O'M. & H. 182). The candidate is, therefore, liable for any illegal acts of his agent, or of a person acting under the authority of his agent, even where such acts are contrary to his express instructions (see *Middlesex*, 1804, 2 Peck. 32; *Norwich*, 1869, 1 O'M. & H. 10; *Bewdley*, 1869, *ibid.* 18; *Lichfield*, 1869, *ibid.* 26; *Bridgwater*, 1869, *ibid.* 115; *Taunton*, 1869, *ibid.* 182; *Barnstable*, 1874, 2 O'M. & H. 105). But to make a candidate liable for the acts of an agent, whose authority was limited to a particular transaction, it is necessary to show that the agent was acting within the scope of his authority (*Harwich*, 1880, 3 O'M. & H. 70; *Westbury*, 1880, *ibid.* 80).

Although, however, the sitting member is responsible for the corrupt act of his agent, committed contrary to his wish and direction, yet, where his agent commits an unauthorised act of corruption, under a treacherous agreement with the other side, it would not avoid the seat (*Stafford*, 1869, 1 O'M. & H. 230).

As to liability for the acts of a drunken agent, see Day, *El. Cas.* 64, and *Montgomery*, 1892, *ibid.* 151, in which case, on a charge of bribery by a drunken agent, the judges differed.

EVIDENCE OF AGENCY.—There has not been, and of necessity there cannot be, any precise definition of the degree of evidence requisite to establish such a relation between the candidate or the sitting member and the person guilty of corruption as will constitute agency (*Bewdley*, 1869, 1 O'M. & H. 17; *Bridgwater*, 1869, *ibid.* 115; *Taunton*, 1869, *ibid.* 185; *Taunton*, 1874, 2 O'M. & H. 73). Any person authorised by the candidate to act on his behalf in matters relating to the election is an agent; a man, indeed, may become an agent, not only by actual employ-

ment, but also by the recognition and acceptance of his services (see *per* Lush, J., *Harwich*, 1880, 3 O'M. & H. 70; *per* Channell, J., *Great Yarmouth*, 1906); moreover, a person proved to be an agent with general authority (nowadays the election agent), is not only himself an agent of the candidate, but also makes those persons agents whom he employs (*Bewdley*, 1869, 1 O'M. & H. 18).

As to what is sufficient to constitute a person an agent, it has been held that there is some evidence of agency whenever a person is in any way allowed by a candidate, or has the candidate's sanction, to try to carry on his election and to act for him, or where the candidate is proved to have to some extent put himself in the hands of others, or to have made common cause with them for the purpose of promoting his election (see *per* Grove, J., *Taunton*, 1874, 2 O'M. & H. 74). A candidate is liable for the acts of any person whom he has put in his place to do a portion of his task, namely, to procure his election (*per* Field, J., *Aylesbury*, 1886, 4 O'M. & H. 62; see also *Haggerston*, 1896, 5 O'M. & H. 84). A mere volunteer, however, who gives his services without being asked, is not an agent, for every supporter of a candidate who chooses to canvass and to make speeches in his favour cannot force himself upon the candidate as an agent (*Ipswich*, 1857, Wolf. & D. 179; *Staleybridge*, 1869, 1 O'M. & H. 67; *Londonderry*, 1869, *ibid.* 278); nor does the mere fact of the candidate not interfering with persons acting in his support necessarily entail on him liability for any unlawful act of theirs of which he is ignorant (*Taunton*, 1874, 2 O'M. & H. 74). It is, moreover, clear that a person is not to be made an agent of the sitting member by his merely acting; that is not enough; he must act in promotion of the election, and he must have authority, or there must be circumstances from which authority can be inferred (*Stroud*, 1874, 3 O'M. & H. 11).

Workers at Election.—The employment of persons in matters relating to the election, *e.g.* to attend meetings and speak on behalf of the candidate, to canvass, to bring voters to the poll, etc., may establish the relation of agency. Employment of a person to get votes, authority to get votes, or getting votes to the knowledge of the candidate or of any of his agents, and the acceptance or non-repudiation of such services would constitute agency and render the candidate liable for the acts of such worker (*Great Yarmouth*, 1906, *per* Channell, J.). In *Great Yarmouth*, 1906, the judges differed on the question whether agency existed where it was proved that a person, who was not on the list of workers, had actively assisted at the election, taking possession of one of the vehicles lent to the party, and using it to bring up many voters to the poll within sight of an authorised agent, who allowed the worker to continue to bring up voters after he had been accused of bribery, which he denied. Channell, J., held on these facts that agency was clearly established, but Grantham, J., dissented. Whether a worker at an election is an agent of the candidate is, however, entirely a question of degree (see *per* Blackburn, J., *Hereford*, 1869, 1 O'M. & H. 195; *Hastings*, 1869, *ibid.* 219; *Worcester*, 1893, Day's *El. Cas.* 86; *Pontefract*, 1893, *ibid.* 131; *Haggerston*, 1896, 5 O'M. & H. 77). Thus the butler of a candidate, though he had made certain payments in connection with the election (*Cockermouth*, 1853, 2 Pow. R. & D. 170); a person employed as a messenger only (*Windsor*, 1869, 1 O'M. & H. 3; *Durham*, 1874, 2 O'M. & H. 137); and one who, in fact, was merely a messenger, though nominally called a canvasser (*Bodmin*, 1869, 1 O'M. & H. 120), have been

held not to be agents. The fact of the candidate handing money to an individual for election purposes affords strong evidence that such person is an agent (*Galway*, 1857, Wolf. & D. 141; *Bewdley*, 1869, 1 O'M. & H. 18).

Canvassers.—With regard to canvassing, it may be stated as a general rule that any person who is authorised by the candidate, or his agents, to canvass is an agent (*Penryn*, 1819, Corb. & D. 61; *Ipswich*, 1835, Kn. & O. 345; *Norwich*, 1869, 1 O'M. & H. 10; *Windsor*, 1869, *ibid.* 3; *Lichfield*, 1869, *ibid.* 25; *Stroud*, 1874, 3 O'M. & H. 11; *Harwich*, 1880, *ibid.* 70); general canvassing is in all cases strong evidence of agency (*Wigan*, 1881, 4 O'M. & H. 13). But the mere fact of accompanying the candidate on his canvass and canvassing in his presence, though it is strong evidence, is not of itself conclusive of agency (*Great Yarmouth*, 1860, Wolf. & B. 118; *Shrewsbury*, 1870, 2 O'M. & H. 36; *Salisbury*, 1883, 4 O'M. & H. 21); where, however, a person, in addition to canvassing with the candidate, also introduced people to him, who were then asked for their votes, it was held to be sufficient evidence of agency (*Rochester*, 1892, Day's *El. Cas.* 102). If the authority to canvass be limited either to particular voters, or to a particular class of voters, *e.g.* workmen employed by the canvasser, or to a particular district, the candidate will only be liable for acts within the scope of such limited authority (*Bodmin*, 1869, 1 O'M. & H. 120; *North Norfolk*, 1869, *ibid.* 237; *Durham*, 1874, 2 O'M. & H. 136; *Harwich*, 1880, 3 O'M. & H. 70; *Wigan*, 1881, 4 O'M. & H. 12). See also CANVASSING.

Committeemen.—The fact of being a member of a central or district committee, appointed for the conduct of an election, is evidence of agency (*Tynemouth*, 1853, 2 Pow. R. & D. 183; *Liverpool*, 1853, *ibid.* 250; *Nottingham*, 1843, Bar. & Arn. 156; *Preston*, 1859, Wolf. & B. 72; *Dublin*, 1869, 1 O'M. & H. 272; *Wakefield*, 1874, 2 O'M. & H. 102; *Durham*, 1874, *ibid.* 136; *Montgomery*, 1892, Day's *El. Cas.* 148). But this, again, is a question of degree; the members, therefore, of a large committee, several hundreds in number, were held not to be agents, the number itself precluding the idea of confidence being reposed in each individual by the candidate (*Westminster*, 1869, 1 O'M. & H. 92); so, also, the members of a self-constituted committee of volunteers are not agents (*Drogheda*, 1857, Wolf. & D. 209; *Staleybridge*, 1869, 1 O'M. & H. 67).

Political and other Associations.—Members of political associations or clubs, and more particularly members of an executive committee of such an association, if actively participating in the actual conduct of an election, may be agents for the candidate. Whether they are so depends upon the facts in each case. The recognition of their action by the candidate, *e.g.* by his allowing them to canvass for him personally, and not merely for the party he represents, would make the members of the association, or its executive committee, his agents. The agency of political associations has been a subject of considerable and increasing importance at recent elections, and has figured conspicuously in recent petitions (see *Taunton*, 1869, 1 O'M. & H. 181; *Blackburn*, 1869, *ibid.* 200; *Wakefield*, 1874, 2 O'M. & H. 102; *Bewdley*, 1880, 3 O'M. & H. 145; *Wigan*, 1881, 4 O'M. & H. 7; *Walsall*, 1892, *ibid.* 123; *Hexham*, 1892, *ibid.* 145; *Worcester*, 1892, *ibid.* 153; *Rochester*, 1892, *ibid.* 158; *Lancaster*, 1896, 5 O'M. & H. 42; *Haggerston*, 1896, *ibid.* 77; *St. George's*, 1896, *ibid.* 97; *Cockermouth*, 1901, *ibid.* 156; *Maidstone*, 1906). In *St. George's*, 1896, 5 O'M. & H. 97, the officers of a political association,

the "Irish Unionist Alliance," were unsuccessfully alleged to have been agents of the respondent. Pollock, B., pointed out that whether a candidate by attending the meetings of a political association makes it, or any of its officers, his agents, depends on the object and character of the association. If the object be to secure the election of a particular candidate, and he takes part in its operations, he would be liable for its acts during an election. If the object be to secure the election of some candidate professing the political views of one of the great political parties dividing the electorate, a candidate attending its meetings during an election and availing himself of its assistance would probably be held to have constituted its officers his agents. But if the object of the association be to promote a particular political principle, such as the maintenance of the Union or a Local Veto Bill, and the candidate attends its meetings, hears its views and explains his own, he does not thereby make its officers his agents. Members of associations of a non-political character, *e.g.* the Licensed Victuallers' Association, are on a somewhat different footing from that of members of political associations, for although in the course of advancing their own interests at an election, which they are entitled to do, they may incidentally afford support to one of the candidates, they do not thereby become his agents (*Walsall*, 1892, 4 O'M. & H. 124; see also Day's *El. Cas.* 46; *Stepney*, 1892, *ibid.* 118). The question of the agency of associations for the promotion of fiscal reform, which has not hitherto been raised in the Courts, would seem to be determinable on the above principles.

Agency of Clergy.—The agency of the clergy, bishops and priests, has been frequently established at Irish elections, and their acts have in many cases avoided the election (*Galway*, 1872, 2 O'M. & H. 53; *Galway*, 1874, *ibid.* 197; *South Meath*, 1892, 4 O'M. & H. 130; *North Meath*, 1892, *ibid.* 185).

Agency at Former Election.—Agency at a previous election is not as a general rule evidence of agency at a subsequent election (*Ashburton*, 1859, Wolf. & B. 3; see also *Penryn*, 1835, Kn. & O. 443). Circumstances may, however, so connect the two elections as to make such evidence admissible; so, where an organised system of bribery had prevailed at a previous election, it was held that the agent who had carried on such system, though he had received no fresh authority, was still an agent at a subsequent election (*Waterford*, 1870, 2 O'M. & H. 2). But evidence of agency at a previous election would only be admitted under special circumstances.

Agency in Joint Candidature.—In the case of a joint candidature, where two candidates coalesce, the agents of the one are the agents of the other, so that if any corrupt act is proved to have been done subsequently to the coalition, by an agent of one, both will be jointly responsible for it (*North Norfolk*, 1869, 1 O'M. & H. 240; see also *Bridgwater*, 1869, *ibid.* 113; *Stafford*, 1869, *ibid.* 232; *Norwich*, 1871, 2 O'M. & H. 39), though, in a recent case, the Court granted relief to one of two joint candidates, the other being unseated (*Southampton*, 1895). But joint attention to the registration does not necessarily imply joint candidature (*Tamworth*, 1869, 1 O'M. & H. 82). For a statutory definition of joint candidates, see the Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51, sched. i. pt. v. (4).

Facts indicating Agency.—The brother of a sitting member (*Ipswich*,

1857, Wolf. & D. 178), the partner of an agent (*Norwich*, 1833, Per. & K. 565), and the son of an agent (*Westminster*, 1869, 1 O'M. & H. 96), though they may have taken part in the election, are not necessarily agents; but in one case the respondent was held liable for the act of the wife of an agent (*Cashel*, 1869, 1 O'M. & H. 288).

Each case, however, depends entirely upon its own particular circumstances, and the fact of agency may frequently be established as a matter of inference from an aggregate of facts which, viewed together, cogently indicate the relation, though each in itself, when considered alone, may appear unimportant and inconclusive (*Bewdley*, 1869, 1 O'M. & H. 18). In every case, indeed, agency is a result of law, to be drawn from the facts of the case, and from the acts of individuals; and the existence of agency is determined, not by the intention of the candidate, but by the authority either directly or indirectly given by him (*Sligo*, 1869, 1 O'M. & H. 301; see also *North Meath*, 1892, Day's *El. Cas.* 145).

Commencement of Agency.—It has been decided that agency for the purpose of rendering the candidate liable for the acts of persons on his behalf, may commence before the issue of the writ, and even before the dissolution (*Walsall*, 1892, 4 O'M. & H. 125; *Montgomery*, 1892, *ibid.* 168). In the former case it was said (*per* Hawkins, J.) that the period of such liability commenced from the time when it was first known that the respondent announced his intention to present himself as a candidate at the next ensuing election (see also *Lichfield*, 1895, 5 O'M. & H. 35, *per* Pollock, B.; *Lancaster*, 1896, *ibid.* 50). A respondent has, in fact, been held liable for illegal acts of his agent committed more than eight months before the election (*Hexham*, 1892, Day's *El. Cas.* 44, 94). See also CANDIDATE; ELECTION EXPENSES.

Termination of Agency.—Agency, in general, ceases with the termination of the election, *i.e.* on the declaration of the poll, and any corrupt acts subsequent to the election are only material against the candidate as throwing light on what took place before the election, or where it is proved that they were done by his personal direction or with his privity (*Salford*, 1869, 1 O'M. & H. 136; *King's Lynn*, 1869, *ibid.* 208; *Southampton*, 1869, *ibid.* 223; *Waterford*, 1870, 2 O'M. & H. 3; *Longford*, 1870, *ibid.* 12; *Galway*, 1872, *ibid.* 49; *Taunton*, 1874, *ibid.* 67; *East Clare*, 1892, Day's *El. Cas.* 167).

Proof of Agency at Trial of Petition.—Sec. 17 of the Parliamentary Elections Act, 1868, provides that at the trial of an election petition, unless the Court otherwise directs, any charge of corrupt practice may be gone into, and evidence in relation thereto received, before any proof has been given of agency on the part of any candidate in respect of it. On this point see *Guildford*, 1869, 1 O'M. & H. 14; and *Bristol*, 1870, 2 O'M. & H. 29. At the trial of election petitions, evidence on charges of bribery and treating is in practice usually received before evidence as to agency. In *Great Yarmouth*, 1906, the Court refused the application by the petitioner's counsel to exclude evidence of corrupt practices until agency had been proved. When, at the trial, *primâ facie* evidence of agency has been given, the onus of disproving agency rests upon the respondent (*Worcester*, 1892, Day's *El. Cas.* 89), and even though a strong *primâ facie* case of agency be established, it may, like any other fact, be rebutted by evidence.

Election Agent and Sub-Agents.—The Corrupt and Illegal Practices

Prevention Act, 1883, without interfering with the previous law as to election agency, provides for the appointment of an election agent, and, in the case of counties only, sub-agents, who alone have the power to appoint all polling agents, clerks, and messengers. The names and addresses of the election agent and all sub-agents must, under the Act, be made public, so that the fact of agency in their case is beyond dispute. It should be observed that any act or default of a sub-agent has (by sec. 25 (2)) the same result as if it had been the act or default of the election agent. As to the appointment, powers, and duties of the election agent and sub-agents, see ELECTION AGENT.

Municipal Elections.—With regard to municipal and other elections, the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 100 (3), enacts that the principles, practice and rules for the time being observed in the case of parliamentary election petitions, and, in particular, the principles and rules with regard to agency and evidence, are (subject to the provisions of the Act and rules made thereunder) to be observed so far as may be in the case of a municipal election petition.

This enactment is applied to municipal elections in the City of London by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70, s. 35; to County Council elections by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75; and by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3) and (8), to Parish Council elections and other elections under that Act. As to Metropolitan Borough Councils elections, see the London Government Act, 1899, 62 & 63 Vict. c. 14, s. 2 (4) and (5), by which the same enactment is indirectly incorporated.

Agency Terms.—This expression describes the arrangement for mutual remuneration, as between a country solicitor and the solicitor in London whom he employs to act as his town agent. For the purposes of litigation, the town agent alone is recognised as the solicitor in the action. So, where a scandalous affidavit was filed by the London agent, he was held responsible for the costs as between solicitor and client, although the country solicitor himself drew the affidavit (*Ex parte Wake*, 1833, 3 Deac. & Ch. 246; and see *The Burgesses of Ruthin* v. *Adams*, 1835, 7 Sim. 345; 58 E. R. 870). The journeys of a country solicitor to town to attend counsel, and otherwise to conduct the proceedings in an action, ought not to be allowed on taxation simply on the principle that the country solicitor would probably be better acquainted with the subject-matter than the London agent, unless the solicitor had authority from his client to make these charges (*In re Storer*, 1884, 26 Ch. D. 189, *per* Pearson, J., dissenting from Bacon, C.J., *In re Foster*, 1878, 8 Ch. D. 598).

Where a country solicitor has an office in the country and another in London, he is not entitled to agency charges for letters written from one office to another on client's business (*In re Harle*, 1868, 19 L. T. 305). According to the usual agency terms between a country solicitor and London agent, the London agent is only entitled to payment in full of all out-of-pocket expenses, and to a share of one-half or one-third, as may be agreed to, of the profit charges; he is not, in the absence of special agreement, entitled to share in any other profits made by the country solicitor in the business, or in interest paid to the solicitor on unpaid costs. An agreement by a country solicitor with a London

solicitor, that the latter should be his London agent, on the usual agency terms, but that the London agent should not call upon the country solicitor to pay any of his agency bills until he had obtained payment of his bill of costs from his client, does not entitle the London agent to share in interest paid to the country solicitor on unpaid costs (*Ward* v. *Lawson*, 1890, 59 L. J. Ch. 323). A., a solicitor, being one of three mortgagees, arranged with another solicitor, B., to act as his agent in the matter of the mortgage, on agency terms. B. accordingly acted, and sent in his bill, prepared as between solicitor and client, which was paid by the mortgagees. B. allowed A. £100 as his share of the profits; afterwards, on the application of second incumbrancers, the bill was taxed. It was held that the taxing-master was right in taxing it on the principle of solicitor and agent, and that the benefit of the agreement enured for the trust estate (*In re Taylor*, 1854, 18 Beav. 165; 52 E. R. 65). A London agent has a lien as against the country solicitor for all his agency charges, and does not lose it by acting for a client who applies for an order to tax the bill of the country solicitor (*In re Jones & Roberts*, [1905] 2 Ch. 219). See BILL OF COSTS; COSTS; SOLICITOR.

Agent; Agent, Crimes by.—See PRINCIPAL AND AGENT.

Agents-General are representatives of the self-governing colonies of Great Britain at the metropolis. The seven Australian colonies, the Cape, and Natal, are each so represented; and the Canadian provinces, except Newfoundland (which as yet has no agent) are represented by a high commissioner, whose functions are practically the same as those of an agent-general. The high commissioner and the agents-general form together a sort of colonial *corps diplomatique*, of which the Canadian representative, as agent of by far the largest colonial agglomeration, is the acknowledged *doyen*. As an example of the duties of an agent-general, the Canadian Act, 43 Vict. c. 11, fixing those of the high commissioner, may be taken. This Act states:

"The high commissioner shall—

"1. Act as representative and resident agent of Canada in the United Kingdom, and in that capacity execute such powers and perform such duties as are from time to time conferred upon and assigned to him by the Governor in Council;

"2. Take the charge, supervision, and control of the immigration offices and agencies in the United Kingdom under the Minister of Agriculture;

"3. Carry out such instructions as he from time to time receives from the Governor in Council respecting the commercial, financial, and general interests of Canada in the United Kingdom and elsewhere."

The practice is, to accredit the agent-general to the Colonial Secretary, who, in turn, presents him to the King. He holds intercourse, however, with the different Government departments, as the interests of his colony and the instructions of his Government may demand; his position in this respect being, so to speak, more intimate than that of British representatives at foreign Courts.

All the agents-general have their offices in Victoria Street, Westminster; and they meet each other when occasion requires. From time to time they have even been associated with the British representative in diplomatic negotiations affecting colonial interests. See CROWN AGENTS FOR THE COLONIES.

[See, for Canada, in *Massey's Magazine* for November 1896, article on "The Representation of Canada in the United Kingdom," by T. G. Colmer, C.M.G., Secretary of the Canadian Government Office in London.]

Aggravated Assault is not, in substance, a different offence from common assault. But where ACTUAL BODILY HARM (*q.v.*) is caused by an assault, the punishment may be increased (24 & 25 Vict. c. 100, s. 47). With this may be compared the penalties for libel, according as it is published with or without knowledge of its falsity (6 & 7 Vict. c. 96, ss. 4, 5; *R.* v. *Munslow*, [1895] 1 Q. B. 758).

In cases of assault or battery on females or on boys under fourteen years of age, brought before a Court of summary jurisdiction, the Court, if satisfied that the assault or battery is of such an aggravated nature that the penalty which can be imposed on a summary conviction for common assault would be inadequate, may try the case summarily, and, on conviction, may impose imprisonment for not more than six months, or a fine not exceeding, with costs, twenty pounds (24 & 25 Vict. c. 100, s. 43). It is immaterial whether the prosecutor is or is not the party aggrieved (see AGGRIEVED). The justices may decide (24 & 25 Vict. c. 100, s. 46), but the accused cannot elect, to have the case sent for trial on indictment (42 & 43 Vict. c. 43, s. 17). In the event of sentence, on summary conviction, to imprisonment without the option of a fine, there is an appeal to Quarter Sessions (42 & 43 Vict. c. 43, s. 19). Where the credible part of the evidence would suffice to justify a conviction for indecent assault, or for a felony, or where the assault was accompanied by an attempt to commit felony, or is a fit subject for prosecution on indictment, the justices must not deal with the case summarily, but must commit for trial (24 & 25 Vict. c. 100, v. 46) (*In re Thompson*, 1860, 30 L. J. M. C. 20; *Wilkinson* v. *Dutton*, 1863, 32 L. J. M. C. 152). The age of the boy assaulted is determined by the opinion of the justices (24 & 25 Vict. c. 100, s. 43; but *cf.* 4 Edw. VII. c. 15, s. 17). In the case of assault on a boy under fourteen or a girl under sixteen years of age, the procedure sections of the Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15 (ss. 4-10, 12-18), apply. Where the aggravated assault is by husband on wife, the provisions of the Summary Jurisdiction Married Women Act, 1895, 58 & 59 Vict. c. 39, apply. Appeals from a conviction for aggravated assault lie to Quarter Sessions, while appeals from separation orders made under the Act of 1895 go to the Probate, etc., Division (s. 11). See Lushington, *Summary Jurisdiction Married Women Act*, 2nd ed., 1904, p. 125. A prosecution for aggravated assault may be instituted by any person (24 & 25 Vict. c. 100, s. 43; and see *R.* v. *Gaunt*, 1895, 18 Cox C. C. 210); but where a charge of aggravated assault is brought by the person aggrieved, and is decided on the merits, a certificate of conviction or dismissal is a bar to all subsequent proceedings, civil or criminal, for the same cause, if, in the case of conviction, the fine or imprisonment imposed has been paid or suffered (24 & 25 Vict. c. 100, s. 45). See ASSAULT; and Stone, *Justice of Peace*, 38th ed. 132.

Aggravation in Pleading.—(*a*) In Civil Cases, see DAMAGES, RULES OF PLEADING AS TO DAMAGES; (*b*) In Criminal Cases, see INDICTMENT.

Aggravation of Damages.—See DAMAGES.

Aggrieved.—A *locus standi* to take proceedings to rectify a grievance is conferred by many statutes upon "any person aggrieved," and questions often arise as to who are within the meaning of the words. In each case, the purposes and operation of the particular statute in which the words are used must be considered in determining their scope, since, as the cases cited show, very different constructions have been put upon them. The chief distinction suggested by the authorities is that where the rectification of a public register, as for example the registers kept under the Patents, Designs, and Trade Marks Acts, is concerned, the widest construction will be given to the words. In the *Apollinaris Co.'s Trade Marks Case*, [1891] 2 Ch., at p. 224, Fry, L.J., said: "The words 'person aggrieved' appear to us to have been introduced into the statute to prevent the action of common informers, or of persons interfering from merely sentimental motives" [see also *Ellis's Trade Mark*, 1904, 21 R. P. C. 617]; and the Court decided that, upon an application to rectify the Trade Marks Register, anyone who is intimidated or harassed, or whose trade is or may be restricted (see *Powell's Trade Marks*, [1893] 2 Ch. 388; [1894] App. Cas. 8), by an entry in the register was, as a person aggrieved, entitled to apply to rectify the register, under sec. 90. [See now Trade Marks Act, 1905, 5 Edw. VII. c. 15, s. 35.] On the other hand, where the words are used to confer a right of appeal against a judicial or administrative order, only persons directly affected by the operation of the order are usually deemed to be aggrieved, so as to be able to appeal. "The words (in the Bankruptcy Act) do not really mean a man who is disappointed of a benefit, which he might have received if some other order had been made. A person aggrieved must be a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something" (*per* James, L.J., in *Ex parte Sidebotham*, 1880, 14 Ch. D. 458).

The prosecutor under a penal statute is not a person aggrieved by an acquittal (*R.* v. *JJ. of London*, 1890, 25 Q. B. D. 357).

The following are instances of the use of the words:—Patents, Designs, and Trade Marks Act, 1883, s. 90 [Trade Marks Acts, 1905, s. 35] (see *Apollinaris Co.* and *Powell's Cases, supra* [*Crompton & Co.'s T. M.*, [1902] 1 Ch. 758]; and Kerly and Underhay on *Trade Marks*, p. 81). Copyright Act, 5 & 6 Vict. c. 45, s. 14 (see *Graves' Case*, 1869, L. R. 4 Q. B. 715; *Chappell* v. *Purday*, 1845, 12 Mee. & W. 303; 69 R. R. 698; and Scrutton on *Copyright*, 4th ed., pp. 152, 199). Bankruptcy Act, 1883, ss. 104, 90 (see *Ex parte Sidebotham, supra*; *re Reed & Co.*, 1887, 19 Q. B. D. 174; and Williams on *Bankruptcy*, 8th ed., p. 334). Licensing Act, 1872, s. 52 (see *R.* v. *JJ. of Andover*, 1886, 16 Q. B. D. 711). Alehouse Act, 1828, 9 Geo. IV. c. 61, s. 27 (see *R.* v. *JJ. of Surrey*, 1888, 52 J. P. 423; and Paterson's *Licensing Acts*, 16th ed., pp. 158, 448, 533). 13 & 14 Car. II. c. 12, and 3 Will. & Mary, c. 11 (as to pauper settlements) (see *R.* v. *JJ. of Westmoreland*, 1843, 12 L. J. M. C. 113). Public Health Act, 1875, s. 253 (see *Fletcher* v. *Hudson*, 1879, 5 Ex. D. 287; *Boyce* v. *Higgins*, 1853, 14 C. B. 1, doubted in Lumley's *Public Health*, 6th ed., 360 (*q.v.*); *Rochfort* v. *Atherley*, 1876, 1 Ex. D. 511). Highway Act, 1835, s. 88 (see *R.* v. *Taunton St. Mary*, 1815, 3 M. & S. 465).

See, further, a full discussion of the words, and a comparison between a "party grieved" and a common informer, in *Robinson* v. *Currey*, 1881, 7 Q. B. D. 465; see also Stroud's *Judicial Dictionary*, 3rd ed., *s.v.*; an article in the *Justice of the Peace* for 5th Nov. 1887; and, for American cases, Lawson's *Words and Phrases*.

Agistment.—Agistment is the contract by which a person (called the "agister") takes in horses or other cattle to depasture in his grounds (2 Black. *Com.* 452), the consideration being usually a weekly payment of money. The duty imposed upon him by the contract is not that of an insurer, but he is bound to take reasonable care of the animals entrusted to him, and if, owing to his negligence, as in leaving his lands improperly fenced, they should be lost or injured, he will be answerable (*Broadwater* v. *Blot*, 1817, Holt, N. P. 547; 17 R. R. 677; *Smith* v. *Cook*, 1875, 1 Q. B. D. 79). As in other like cases, his responsibility extends (and is confined) to what may be fairly regarded as the natural consequences of the particular act of negligence proved against him (*Halestrap* v. *Gregory*, [1895] 1 Q. B. 561). He is moreover bound to restore the cattle upon demand to their owner (2 Black. *Com.* 452), that is to say, to permit the latter to retake them, though not to re-deliver them himself (see *Corbett* v. *Packington*, 1827, 6 Barn. & Cress. 268).

As in other cases of bailment, the duty on the part of an agister, not to be negligent in dealing with the subject-matter of the agistment, is one which arises at common law out of the relation between the parties as bailor and bailee; and in accordance, therefore, with established rule an action against an agister to recover damages for breach of that duty is an action "founded on tort" within the meaning of sec. 116 of the County Courts Act, 1888 (*Turner* v. *Stallibrass*, [1898] 1 Q. B. 56).

The contract of agistment is not one relating to an interest in land within the 4th section of the Statute of Frauds (*Jones* v. *Flint*, 1839, 10 Ad. & E. 753; 50 R. R. 527).

An agister has sufficient possession of the cattle entrusted to him to entitle him to bring an action of trespass in relation to them (2 Roll. Abr. 551), and such an interest as to permit the property in them to be laid in him in an indictment respecting them (*R.* v. *Woodward*, 1796, 2 East, P. C. 653).

It is now settled that no lien can be claimed by an agister for the price of the agistment, inasmuch as he does not confer any additional value on the animals bailed to him, either by the exertion of any skill of his own or indirectly by means of any instrument in his possession; and *a fortiori* is this the case where the circumstances show that it was not intended that he should have the entire and continuing possession of the cattle, as in the case of cows of which the owner is to have control, either on or away from the agister's lands, during the time of milking (*Jackson* v. *Cummins*, 1839, 5 Mee. & W. 342). But the lien in question may of course be conferred on the agister by express agreement (*Richards* v. *Symons*, 1845, 8 Q. B. 90).

The practice of farmers in acting as agisters of cattle is so notorious, that, in accordance with settled practice, the reputation of ownership (as to which see BANKRUPTCY), in the event of bankruptcy, is excluded (*Re Woodward, ex parte Huggins*, 1886, 54 L. T. 683).

At common law, cattle taken in to be agisted can be distrained for rent (1 Roll. Abr. 669), though it would seem that absolute exemption might well be claimed for them, under a well-known principle, where they have been delivered to an agister in the regular way of his trade (see *per* Mellor, J., in *Miles* v. *Furber*, 1873, L. R. 8 Q. B. 77). But, however this may be, agisted cattle now enjoy a qualified privilege from distress, which has been conferred upon them, as regards tenancies to which the enactment applies (see secs. 54, 61), by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61, s. 45). The "fair price" spoken of in this section need not, it has been held, be necessarily of money; so that cows, for example, agisted on the terms "milk for meat," *i.e.* that the agister should take their milk in exchange for their pasturage, are within the statute (*London and Yorkshire Bank* v. *Belton*, 1885, 15 Q. B. D. 457). But it must be a payment for the feed of cattle merely, and not for an interest in the land or in the nature of rent for use and occupation; so that an agreement to allow the owner of cattle "the exclusive right to feed the grass on the land" for a specified period does not confer upon them the privilege from the landlord's right of distress given by the Act (*Masters* v. *Green*, 1888, 20 Q. B. D. 807).

Agreed and Declared.—Where in a deed such words occur as, "It is hereby agreed and declared between and by the parties to these presents" that someone will do an act or make a payment, and that someone is a party to the deed, it is a covenant by him with the other, not a covenant by all of them (*per* Jessel, M.R., *Dawes* v. *Tredwell*, 1881, 18 Ch. D. 359, and see *In re D'Estampes*, 1884, 53 L. J. Ch. 1017, and Elph. *Interpretation of Deeds*).

Agreement is the expression, by two or more persons, of an intention to affect the legal relations of these persons. The consequence of agreement must affect the parties themselves, otherwise the verdict of a jury or the decision of a Court sitting in banc (*q.v.*) would constitute an agreement. Agreement is a wider term than contract; it includes acts in the law of two kinds, besides those ordinarily termed contracts; it may not create obligation, *e.g.* conveyances and gifts, wherein the agreement of the parties effects at once a transfer of rights *in rem*, and leaves no obligation subsisting between them, or it may create obligation only remotely, as marriage and settlements of property, in trust for persons born and unborn (Anson, *Law of Contract*, 10th ed., p. 2). See CONTRACT.

Agreement for a Lease.—See LANDLORD AND TENANT; SPECIFIC PERFORMANCE.

Agreement not to Prosecute.—See HUSH MONEY; PUBLIC POLICY.

Agricultural Children.—An attempt was first made by the Agricultural Children's Act, 1873, 36 & 37 Vict. c. 67, "to make regulations with respect to the employment of children in the execution of various kinds of agricultural work, with a view to their better education." That Act prescribed certain regulations, but it remained in force only for three years, being repealed in 1876 by the Elementary Educa-

tion Act, 1876, 39 & 40 Vict. c. 79, s. 52. The same object is sought to be attained by the Elementary Education Acts. It is provided that every person who takes into his employment a child of the age of twelve years, and under the age of fourteen years, resident in a school district, before that child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district for the total or partial exemption of children of the like age from the obligation to attend school, shall be deemed to take such child into his employment in contravention of the Elementary Education Act, 1876, and shall be liable to a penalty accordingly (43 & 44 Vict. c. 23, s. 4; 56 & 57 Vict. c. 51; 39 & 40 Vict. c. 79, s. 5; 62 & 63 Vict. c. 13; 63 & 64 Vict. c. 53). But a person shall not be deemed to have taken a child into his employment if it is proved, to the satisfaction of the Court having cognisance of the case, that the employment is during a period exempted by special notice of the local authority of the district for the necessary operations of husbandry and ingathering of crops, an exemption which may be extended over not more than six weeks in a year. That is to say, the local authority may, if they think fit, issue a notice exempting from the prohibitions and restrictions of the Elementary Education Act, 1876, the employment of children above the age of eight years, for the necessary operations of husbandry and ingathering of crops for the period to be named in such notice; provided that the period or periods so named by any such local authority shall not exceed in the whole six weeks between the 1st of January and the 31st of December in any one year (39 & 40 Vict. c. 79, s. 9 (3)). A copy of this notice must be sent to the Education Department, and to the overseers of every parish within the jurisdiction of the local authority (*ibid*). The overseers shall cause such notice to be affixed to the door of all churches and chapels in the parish, and the local authority may further advertise any such notice in such manner (if any) as they think fit (*ibid.*). This notice, if issued at all, must extend to the whole district; but it may be confined to children to be employed in particular districts or in a particular branch of industry. The Employment of Children Act, 1903 (3 Edw. VII. c. 45), gives local authorities the power to make by-laws regulating the employment of all children, and, if they see fit, to prohibit such employment in specified occupations; hence what has been written previously must be read subject to any existing local by-laws under the Act. See also AGRICULTURAL GANGS.

Agricultural Gangs.—By the Agricultural Gangs Act, 1867, 30 & 31 Vict. c. 130, which does not apply to Scotland or Ireland (*ibid.* s. 12), regulations are made with respect to the employment of children, young persons, and women, by gang-masters. Under the Act a "child" means a person under the age of thirteen years; a "young person" means a person of the age of thirteen and under the age of eighteen years; a "woman" means a female of the age of thirteen years or upwards; and "gang-master," "any person, whether male or female, who hires children, young persons, or women, with a view to their being employed in agricultural labour on lands not in his own occupation; and until the contrary is proved, any children, young persons, or women employed in agricultural labour on lands not in the occupation of the person who hired them, shall be deemed to have been hired with the aforesaid view" (30 & 31 Vict. c. 130, s. 3). "Agricultural gang"

means a body of children, young persons, and women, or any of them, under the control of a gang-master (*ibid.*). The following are the regulations as to the employment of children, young persons, and women:—(1) No child under the age of *eight* years shall be employed in any agricultural gang (*ibid.* s. 4 (1)). This regulation must now be read as modified by the Elementary Education Acts. For, under those Acts, no child can be taken into employment under the age of twelve (Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, 62 & 63 Vict. c. 13, s. 1; 39 & 40 Vict. c. 79, s. 5; 56 & 57 Vict. c. 51, s. 1). It should be further observed, that a person who takes into employment a child under fourteen (Elementary Education Act, 1900, 63 & 64 Vict. c. 53, s. 6 (1)), before the child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district, is to be deemed to take the child into employment in contravention of the Elementary Education Act, 43 & 44 Vict. 23, s. 4. (2) No females shall be employed in the same agricultural gang with males (30 & 31 Vict. c. 130, s. 4 (2)). (3) No female shall be employed in any gang under any male gang-master, unless a female licensed to act as gang-master is also present with that gang (*ibid.* s. 4 (3)). The penalty on any gang-master contravening any of the above regulations is a penalty not exceeding 20s. for each child, young person, or woman so employed (*ibid.*). An occupier of land on which such employment takes place renders himself liable to a like penalty, unless he proves that it took place without his knowledge (*ibid.*). No person shall act as a gang-master without a licence, under a penalty not exceeding 20s. for every day during which he so acts (*ibid.* s. 5). A licence (for six months at a time only, but renewable) (*ibid.* s. 8), is granted to a gang-master by the district council in the district, or by the town council in the county borough (*ibid.* s. 7; 56 & 57 Vict. c. 73, ss. 27, 32). There is an appeal to Quarter Sessions against the refusal to grant a licence (30 & 31 Vict. c. 130, s. 7). The applicant must show that he is a person of good character, and a fit person to be entrusted with the management of an agricultural gang (*ibid.*). A person who is licensed to sell beer, spirits, or any other excisable liquor, is disqualified (*ibid.* s. 6). The council granting the licence shall annex to the licence a condition limiting, in such manner as they think expedient, the distances within which the children employed by such gang-masters are to be allowed to travel on foot to their work (*ibid.* s. 7). Any gang-master violating the condition so annexed to his licence shall for each offence be liable to a penalty not exceeding 10s. (*ibid.*). The fee for a licence, or for a renewal, is 1s. (*ibid.* s. 9), and is paid to the council granting the licence (*ibid.*; 56 & 57 Vict. c. 73, ss. 27 (3), 32). A conviction of a gang-master of any offence against the Agricultural Gangs Act, 1867, shall be indorsed on the licence (30 & 31 Vict. c. 130, s. 10). On conviction for a second offence, justices may, in addition to any other penalty, withhold the licence for a period not exceeding three months; and on conviction for a third offence, for one not exceeding two years (*ibid.*). After a fourth conviction, a gang-master is disqualified from holding a licence (*ibid.*). Proceedings for offences are taken under the Summary Jurisdiction Acts (*ibid.* s. 11). See also AGRICULTURAL CHILDREN.

Agricultural Holdings.—See TENANT RIGHT.

Agricultural Rates.—See POOR LAW (*Rating*).

Agriculture (Board of).—See BOARD OF AGRICULTURE.

Aid by Verdict and Prayer.—1. It is a rule of the common law of England, that where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer (see DEMURRER), yet, after verdict, if the issue joined in the case be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict, and this is termed aider by verdict. In this article the rule of the common law only is referred to; for statutory provisions to a similar effect, see JEOFAILS. The rule applies in criminal proceedings as well as in civil. (See *Heymann* v. *R.*, L. R. 8 Q. B. 102; *R.* v. *Goldsmith*, L. R. 2 C. C. 74, both decided in 1873). But it does not apply if the defect, omission, or imperfection be in regard to something not in issue between the parties (*Ladd* v. *Thomas*, 12 Ad. & E. 117; *Hearne* v. *Stowell*, *ibid.*, 719; 54 R. R. 663; both decided in 1840); nor if the plaintiff states a defective title, or no title or cause of action at all (see *Jackson* v. *Pesked*, 1813, 1 M. & S. 234; 14 R. R. 417).

2. Aid prayer was the term given to a legal rule by which in real actions (abolished in 1834; see ACTIONS) a tenant might call for assistance, to help him to plead, of another person, *e.g.* a tenant for life of the remainderman, an incumbent of the patron and ordinary. The party of whom aid was prayed was joined in the action, and helped to defend the title.

Aids.—Aids were obligatory payments, made by the feudal vassal to his lord in his necessities. The occasions on which they could be demanded gradually became fixed, and Glanvill (temp. Henry II.) mentions the aid helping a lord to pay the relief due to his overlord, the aid for knighting the lord's eldest son, and the aid for marrying his eldest daughter. Magna Charta (1215) named, as the three aids which the king might take from his tenants without the common council of the realm, those for redeeming his body from captivity, for marrying his daughter, and knighting his son; such aids were to be reasonable. The rate for the two latter aids was fixed at twenty shillings for the knight's fee, or twenty librates of socage land, by statutes Edward I. c. 36, extended so as to bind the king by 25 Edward III. stat. 5, c 11. Aids were abolished by statute 12 Charles II. c. 24.

Air.—The air is one of those natural agents provided for the general use of mankind and other creatures without which the life of man could not be, and upon which many of his ordinary pursuits, either of business or mere enjoyment, depend. In these and some other respects air may be coupled with light and water, and in each the law secures for all men certain rights. Some of these rights are common to all men, as, in the case of the air, the right to breathe the air which will come, and the right to have it free from poisonous vapours. These are natural rights, but there are special rights which may be acquired with reference to property, and they are in the nature of easements. Rights

relating to the air, whether natural rights or easements, divide themselves into two classes, namely, (*a*) rights relating to the free passage of air, and (*b*) rights relating to its purity.

(*a*) As to the former, comparatively few cases have arisen apart from light, and the principles of law relating to air as distinguished from light seem only in modern times to have been recognised; they seem to have been merged in or confused with the principles relating to light, so that, if obstruction of light was complained of, obstruction of air was generally thrown in, and the cases themselves were commonly called light and air cases, as if they were one and the same thing. In recent times the distinction has been marked, and the legal principles as to air considered separately (see *Hall* v. *Lichfield Brewery Co.*, 1880, 49 L. J. Ch. 655). A right to free and uninterrupted passage of air, like light, is a natural right, whether the air is passing over an open field or whether it enters a house by a window, and no wrong is done to a neighbour by opening a window to admit air; but that natural right does not entitle an individual to prevent another person exercising his natural rights, or his right of building or otherwise using his own land in the ordinary way, though he may, by long user or otherwise, be able to gain a right even to do that, and if he does, his right is an easement. See LIGHT.

The legislature has not thought fit to interfere with prescription in the case of the use of air; though in the Prescription Act, 2 & 3 Will. IV. c. 71, special and exceptional provision was made for the easement of light (see ANCIENT LIGHTS), nothing was said about prescriptive rights to free passage of air. Whether this was omitted designedly or otherwise, or whether it was from the common habit of treating rights to light and air as identical, is uncertain, but the result is that prescription for ancient light depends now solely on the statute, and prescription for air entirely on the common law, and the evidence for each must be different, even though the rights are claimed for the same window.

The easement or acquired right of free passage of air can only be claimed for air that would enter a window or some defined aperture in a house or building. It cannot be claimed in respect of open ground or of a windmill for the wind which would blow to them, for that would be too extensive and vague (*Webb* v. *Bird*, 1861-63, 10 C. B. N. S. 268, in Ex. Ch. 13 C. B. N. S. 841), neither can it be claimed for a chimney, if the erection of a building stops the current of air and makes the chimney smoke (*Bryant* v. *Lefever*, 1879, L. R. 4 C. P. D. 172). [See the question discussed and the authorities reviewed, *Chastey* v. *Ackland*, [1895] 2 Ch. 389.]

The converse of the right to free passage of air to a building is a right of free passage of air from it; or, in other words, ventilation. This right has only been recently brought to notice in the case of *Bass* v. *Gregory*, 1890, 25 Q. B. D. 481, in which case ventilation was procured for a cellar through a hole or shaft to an unused well.

(*b*) Purity of air is a natural right, the infringement of which is commonly called a nuisance. See NUISANCE.

It is obvious that, if absolute purity of air were insisted on to its fullest extent, it would be impossible to carry on many of the ordinary affairs of life and necessary trades, and it is therefore subject to limitation. In the cases of *Bamford* v. *Turnley*, 1862, 3 B. & S. 66, and in *St. Helen's Smelting Company* v. *Tipping*, 1865, 11 H. L. C. 642; 11 E. R. 1483, this subject was fully considered. The general principle to

be extracted from these and other cases, as to the occasions on which pollution is justifiable and when not, seems to be that, in the absence of an easement, pollution of the air to such an extent and in such a manner as to produce material injury to health or property is in every case an actionable injury; and it is no justification to allege that the injury was caused by the exercise of a trade in a convenient and proper place, and that the carrying on of it there was a reasonable use by the defendant of his own land; but, if mere personal discomfort is produced, these facts may justify the injury produced, for, though everyone has a right that the air shall not be polluted to such an extent and in such a manner as to interfere materially with the ordinary comfort of human existence, yet he must not be fastidious, for the law will not give a remedy for trifling or mere temporary annoyance, and the locality in which he dwells must be taken into consideration.

In the case of private nuisance by pollution of air, a right to cause such a nuisance may be acquired by long user, but no such right can be so acquired against the public.

It is no justification for a nuisance by pollution of air merely to say that the party complaining came to the nuisance, that is, that the nuisance existed on his land before he came there; for purity of air is a natural right incident to the possession of land, and it cannot be destroyed till an adverse right has been acquired by long user or grant.

[See Goddard on *Easements*, 6th ed., 1904; Gale on *Easements*, 7th ed., 1899.]

Airway.—See MINES.

Aisle.—The word aisle is said to be derived from the French *aile* (*ala*), a wing; for the Norman churches were built in the form of a cross, with a nave and two wings. It signifies the lateral divisions of a church, or any part of it, as the nave, choir, or transepts as called aisles.

An aisle may be private property, but to establish such right the owner must show immemorial possession, and that the owner of the house in respect of which it is claimed, has repaired it.

An aisle in a church, which has time out of mind belonged to a particular house and has been maintained and repaired by the owner of that house, is part of his frank-tenement, and the ordinary cannot dispose of it or intermeddle in it. The freehold of the aisle may be vested in the person entitled to the exclusive use of the same; or such person may have the exclusive use, while the freehold is in the incumbent. A person entitled to such possession may have a prohibition against the ordinary, if he attempts to remove him (*Churton* v. *Frewen*, 1866, L. R. 2 Eq. 634; *Corven* v. *Pym*, 1613, 3 Inst. 202; *Francis* v. *Ley*, 1615, Cro. Jac. 366).

The possession of an aisle and the right to its exclusive use is not necessarily annexed to a dwelling-house, and the possessor may convey it to another (*Chapman* v *Jones*, 1869, L. R. 4 Ex. 273).

If a person having a house in a parish build a new aisle in a church, he may, it appears, have a faculty from the bishop to hold the same to the use of himself and his family to bury their dead, or to hear divine service in it; but such a faculty, it is apprehended, must in express terms, or by reasonable intendment, show an intention to annex the aisle to the house (see *Fuller* v. *Lane*, 1825, 2 Add. 419).

It is conceived that if the faculty were to a man and his family, it would be personal to the grantor and his family, to the exclusion of the future occupiers of the house, and the privilege would be enjoyed by him, so long only as he continued in the parish (Prideaux's *Churchwarden's Guide*, 16th ed., pp. 285, 286 (note)).

The right to a seat in a pew in a private aisle may be annexed to a house outside the parish, by a faculty (*Davis* v. *Witts*, 1809, For. 14; 5 R. R. 708); but not, it is conceived, in a public aisle. Such right may, however, exist by prescription, on the ground that the parishes being later in date than churches, such house, though not in the parish, may formerly have been within the ecclesiastical limits of the church (*Lousley* v. *Hayward*, 1827, 1 Y. & J. 583; 30 R. R. 853; but see *In re The Cathedral Church St. Colomb., Londonderry*, 1863, 8 L. T. 861).

[*Authorities.*—Prideaux's *Churchwarden's Guide*, 16th ed.; Steer's *Parish Law*; Rogers, *Ecclesiastical Law*; Phillimore, *Ecclesiastical Law*, 2nd ed., vol. ii. 1403-1405, 1434.] See also PEWS.

Alabama Case.—The most celebrated international difficulty which has as yet been submitted to arbitration. See ARBITRATION (INTERNATIONAL). The *Alabama* was a vessel built in British waters for use as a war vessel by the Southern Confederates during the United States civil war. The United States minister called the attention of the British Government to the object for which the vessel was notoriously being built, but the law officers considered the evidence offered as to this insufficient, and she was allowed to sail from Liverpool. She was equipped for war at the Azores.

A claim for the damage inflicted by the *Alabama* on Federal trade was submitted under the Treaty of Washington (May 8, 1871) to the arbitration of an international tribunal, constituted as follows:—Lord Chief-Justice Cockburn (Great Britain), Charles Francis Adams (United States), Count Sclopis (Italy), M. Stæmpfli (Switzerland), Marcos Antonio d'Aranjo, Viscount d'Itajúbá (Brazil). It met at Geneva on December 17, 1871.

The award, delivered on September 15, 1872, made Great Britain liable for the damage sustained by the Northern States, and assessed the indemnity due by the former at £3,229,166.

In the treaty of submission certain rules were proposed by the American commissioners, and agreed to by Great Britain, as principles by which the deliberations of the tribunal of arbitration were to be governed, though it was declared on behalf of Great Britain that she did not assent to the rules as a statement of the principles of international law in force at the time when the claims mentioned arose. The high contracting parties agreed to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and invite them to accede to them.

The rules in question were as follows:—

"A neutral Government is bound—

"*First.* To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to

cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

"*Secondly.* Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

"*Thirdly.* To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

These rules are considered by jurists as a statement of contemporary international law on the points they deal with.

A claim by the United States for indirect damage was negatived by the tribunal at the outset of the proceedings. See FOREIGN ENLISTMENT.

Alb.—See VESTMENTS.

Aldermen.—By the Municipal Corporations Act, 1835, 5 & 6 Will. IV. c. 76, and other Acts, consolidated by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, the council of a borough consists of the mayor, aldermen, and councillors, elected as prescribed by ss. 50-61.

County Councils under the Local Government Act, 1888, 51 & 52 Vict. c. 41, are, as to their constitution, in all respects like the council of a borough which is divided into wards, and the aldermen are called county aldermen (s. 2).

The aldermen of the City of London are not affected by these Acts. (See as to them, Pulling, *Laws, etc., of London*, pp. 32, 36, 74).

The government of towns by mayor and aldermen became established by the beginning of the thirteenth century, and the title of alderman was borrowed from the Saxon "ealdorman," the viceroy of a kingdom, county, or district, and applied to the heads of the merchant guilds into whose hands the government of the towns had fallen; it being thence transferred to the magistrates of the several wards into which towns were divided, or to the sworn assistants of the mayor, in the cases where no such division was made (Stubbs' *Constitutional History of England*, vol. iii. pp. 561, 565).

Under sec. 3 of the Act of 1882, the returning officer for the ward at the election of borough councillors is an alderman assigned by the council. The County Council may appoint any other person (sec. 75 of the Act of 1888).

Aldermen are elected by the council from amongst the councillors, or persons qualified to be councillors (sec. 14, Act of 1882), in the proportion of one-third of the councillors; but in the administrative county of London they are not to exceed one-sixth (sec. 40 of Act of 1888). Their term of office is six years; one-half of their number retiring, who have been longest appointed, at the end of every third year. On being elected alderman, a councillor vacates his office. The qualifications of borough and county aldermen are the same; but for the county a person is eligible if he is a peer owning property in the county, or is registered as a parliamentary voter in respect of the ownership of property of any tenure situate therein (sec. 11 of Act of 1882, and sec. 2 of Act of 1888). Being in holy orders, or the regular ministry of a dissenting

congregation, is no disqualification under the latter Act, as it is under the former.

The office is vacated by absence from the borough, except for illness, for more than six months (Act 1882, s. 39); from the county for more than twelve months (Act 1888, s. 75).

An outgoing alderman cannot vote in the election of aldermen, but he may for the mayor (*Hounsell* v. *Suttill*, 1887, 19 Q. B. D. 498; 56 L. J. Q. B. 502; 57 L. T. 102). The office of an alderman (municipal) who resigns must be declared vacant by the council; and therefore an alderman who goes out of office by rotation cannot vote at the election of aldermen merely by resigning before the appointed day of election (*Pease* v. *Lowden*, [1899] 1 Q. B. 386). A county alderman, as such, is expressly prohibited from voting in the election of county aldermen (Local Government Act, 1888, s. 2 (2) (*c*)).

An alderman may be elected councillor, but apparently he thereby vacates his aldermanic seat (*R.* v. *Bangor* (*Mayor*), 1886, 18 Q. B. D. 349; 56 L. J. Q. B. 326; and in 1888, *s.c.* 13 App. Cas. 241; 57 L. J. Q. B. 313; 58 L. T. 502), where the question as to whether an alderman was eligible for election as a councillor was discussed but not settled.

As to disqualifications of sex, etc., in common with other holders of municipal offices, see Rogers' *Elections*, vol. iii. pp. 6-18.

Alderney.—See CHANNEL ISLANDS.

Aldridge's.—The proprietor of Aldridge's is probably a horse-dealer in the technical sense of the term (*Allen* v. *Sharp*, 1848, 17 L. J. Ex. 209). See HORSES.

Alehouse.—Alehouses are regarded as places where excisable liquors are sold and consumed. For the purpose of the sale of intoxicating liquors, a justice's licence and an excise licence are necessary. The granting of justices' licences, the control of licensed houses, and the transfer of licences, are regulated by the Alehouse Act, 1828, 9 Geo. IV. c. 61, and amending Acts. Justices' licences are granted at the general annual licensing meeting of justices to "persons keeping or about to keep inns, alehouses, and victualling-houses, to sell excisable liquors, by retail, to be drunk or consumed on the premises" (9 Geo IV. c. 61, s. 1). The general annual licensing meetings are held (throughout the country) within the first fourteen days of the month of February in each year, and every adjournment thereof within one month of the date of the general annual licensing meeting (Licensing Act, 1902, 2 Edw. VII. c. 28, s. 14 (1)). Excise licences are granted under the Excise Licences Act, 1825, 6 Geo. IV. c. 81, and amending Acts. The subject is fully discussed under LICENSING, *post*. For separate treatises on the Licensing Acts, reference may be made to Paterson's *Licensing Acts*, 17th ed., 1906, by W. Mackenzie; and *The Law of Licensing*, 1905, by G. J. Talbot.

Alias.—The ordinary use of this term is to describe a name, other than his proper baptismal name or proper surname, by which a person passes or is commonly known.

1. The old statutes of *jeofails* did not apply in criminal cases (Hawk., P. C., bk. ii. c. 23, s. 129), and so long as absolute precision was required in stating in an indictment the name and additions of the accused, a

man known by more than one name, or whose name was uncertain, was described as "A. B. otherwise (*alias dictus*) C. D.," to avoid risk of a plea in abatement (see Arch. Cr. Pl., 23rd ed., 55). This is now unnecessary, for in criminal as in civil proceedings, misnomer of a party can be cured by amendment, where the identity of the person intended is made clear. (See ABATEMENT.) In civil proceedings this result is effected by inserting in writ and pleadings the words A. B., *sued as C. D.*, or *trading as C. D.*

2. Where a person is married by banns (*q.v.*) under an *alias*, the marriage is valid (1) if the *alias* is so well established as to be the name by general reputation; (2) if the true name is not known to the other party to the marriage (*Tongue* v. *Tongue*, 1836, 1 Moo. P. C. 90; 12 E. R. 745; 43 R. R. 1; *Gompertz* v. *Kensit*, 1872, L. R. 13 Eq. 369; 4 Geo. IV. c. 76, ss. 8, 22; *R.* v. *Kay*, 1887, 16 Cox C. C. 292).

3. Where the marriage is by licence (*q.v.*) and the identity of the person is established, the use of an *alias* will not affect the validity of the marriage (*Bevan* v. *M'Mahon*, 1861, 30 L. J. P. & M. 61; and see Eversley, *Domestic Relations*, 2nd ed., 91, 96).

The term *alias* is also applied to certain writs issued concurrently for execution in different jurisdictions. Thus, where a sheriff made to a writ the return *non est inventus* or *elongatus est*, or where it was desired to effect an arrest in more than one county, writs of *alias capias* or *pluries capias* were issued, usually to found or execute proceedings for attachment or outlawry. See Crown Office Rules, 1886, r. 101; and Short and Mellor, Cr. Off. Pr. 387, 399.

Alibi.—It is a common defence to a charge of crime to allege and prove that the accused at the time when the crime was committed was at a place so far distant from the *locus delicti commissi* that he could not have been guilty. This defence is now raised under the plea of "not guilty," but at one time it was usual to raise it by "exception," a practice borrowed from Roman law (Pollock and Maitland, *Hist. of Eng. Law*, ii. 612, 651). Evidence in support of an *alibi* can be taken at the inquiry before a magistrate (see 30 & 31 Vict. c. 35, s. 3), and the witnesses called before the magistrate will be bound over to appear at the trial, and their expenses may in that case be payable out of the local rate. This defence, if substantiated, is the most conclusive; but it is often fabricated, especially by habitual criminals. Where necessary, the prosecution will be allowed to call evidence in rebuttal (see Taylor on *Evidence*, 10th ed., s. 336. It has been doubted whether, in proceedings for extradition, evidence of alibi can be received by the English magistrate (Biron and Chalmers on *Extradition*, 1903, p. 40).

Alien (from the Lat. *alienus*, in the sense of belonging to another place), properly speaking, one owing allegiance to a foreign State, but in practice, applied to all persons on British soil who are not British subjects. See BRITISH SUBJECT.

The rule of the English common law is that every person born within the British dominions is a British subject, and every person born out of the British dominions is an alien. This rule is known as the *jus soli*, or territorial test of nationality, in distinction to the *jus sanguinis*, or the test of parentage. The only exception to this rule is the case of the child of an alien enemy being born in a part of the British dominions

at the time of the child's birth in hostile occupation (see *Calvin's Case*, Westlake, *Private International Law*, 4th ed., p. 348; Dicey, *Conflict of Laws*, 1896, p. 176).

By 4 Geo. II. c. 21, it was enacted that the legitimate child of a natural-born British subject, though born out of the British dominions, should be deemed a British subject; and by 13 Geo. III. c. 21, this privilege was extended to the second generation on the father's side, born out of the British dominions. Thus, though the father and grandfather are both born out of Great Britain, the child is British, but the child of this child is an alien.

An illegitimate child by English law, being a *filius nullius*, does not come within the operation of these statutes; and the illegitimate children of a British subject, domiciled in a foreign country, of which the laws permit legitimation by subsequent marriage, though they may be legitimate under the law of the domicile by his marriage with their mother, do not obtain the benefit of them in England, and continue to be aliens (see Hall, *Foreign Jurisdiction*, p. 21). See BASTARD; LEGITIMACY.

The status of aliens in Great Britain is now regulated by the Naturalisation Act, 1870, 33 & 34 Vict. c. 14. At the date of the adoption of this Act, they possessed no political rights, were debarred from ownership of British ships, and could not become owners of real property, or even lease real property for more than twenty-one years.

The Naturalisation Act, 1870, removed the last of these three disabilities, secs. 2, 3, and 4 providing that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien, in the same manner in all respects, as through, from, or in succession to, a natural-born British subject."

The only exception is, that nothing in the Act is to qualify an alien to be the proprietor of a British ship (s. 14), this subject being dealt with in the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 18, and now by that of 1894, 57 & 58 Vict. c. 60, s. 1. [As to the naturalisation of aliens in England and in the colonies, see article NATURALISATION.]

An alien, "in return for the protection which he receives, and the opportunities of profit and pleasure which he enjoys, is liable," says Mr. Hall, "to a certain extent, at any rate, in moments of emergency, to contribute by his personal service to the maintenance of order in the State from which he is deriving advantage, and, under some circumstances, it may even be permissible to require him to help in protecting it against external dangers" (*Foreign Jurisdiction*, p. 171).

Thus, during the civil war in the United States, Lord Lyons was instructed "that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, residents within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishments" (p. 172). [Thus, the High Court of Pretoria refused compensation to British subjects whose property was commandeered by the Transvaal Government during the Boer war (*Law Mag. and Rev.* xxviii. 89. Cf. *West Rand Central Gold Mining Company* v. *R.*, [1905] 2 K. B. 391).]

The Commercial and Maritime Convention of 1882 between Great Britain and France, provides against "military" service being required on the part of subjects of either contracting party (art. 11), and several such treaties contain a similar provision.

As to a British-born subject of full age, and under no disability, becoming an alien, see ALIENAGE. [Sec. 6 of the Naturalisation Act, 1870, which enables a British subject to become naturalised in a foreign State, does not apply to an enemy State in time of war. The act of becoming naturalised under such circumstances is itself an act of treason, and ineffectual to afford protection against an indictment for treason in subsequently joining the military forces of the enemy (*R.* v. *Lynch*, [1903] 1 K. B. 444).]

The terms *alien friend* (alien amy) and *alien enemy* are used to designate an alien belonging to a country which is at peace or at war with Great Britain, as the case may be. When war breaks out between Great Britain and the State to which an alien belongs, he is usually allowed to remain in this country, provided his conduct is that of an alien friend. And if he resides here with the licence and permission of the Crown, he has the same rights and privileges as an alien friend (*Wells* v. *Williams*, 1698, 1 Salk. 46; *Casseres* v. *Bell*, 1799, 8 T. R. 166; Vin. Abr. "Aliens," L. pt. 8, x.).

An alien enemy's legal position seems to be as follows:—Unless by virtue of an Order in Council, or duly licensed, or unless he comes into the British dominions under a flag of truce or some other act of public authority putting him in the King's peace, an alien enemy cannot maintain an action in the Courts of this country (*The Hoop*, 1799, 1 Rob. C. 196; *Wells* v. *Williams*, 1698, 1 Salk. 45); and when an alien enemy claims it, it is for him to show in virtue of what specific order, licence, or other ground he claims to be protected (*The Phœnix*, 1854, 1 Sp. Ecc. & Adm. 306, 307; *The Troija*, 1854, *ibid.* 342). [A limited liability company, incorporated and registered under the laws of, and carrying on business in, a country at war with Great Britain, is an alien enemy, though the majority of the shareholders are subjects of Great Britain or of neutral States (*Driefontein Consolidated Gold Fields* v. *Jackson*, [1900] 2 Q. B. 339; [1901] 2 K. B. 419; [1902] A. C. 484). An alien enemy cannot sue in an English Court during war between his country and Great Britain, except by agreement of parties; and this has been doubted (*S. C.; and Netherlands S. A. R. C.* v. *Fisher*, 1901, 18 T. L. R. 116). As to trading with the enemy, see *The Mashona*, 1900, 17 Buchanan, 135; *Dunn* v. *Bucknall Brothers*, [1902], 2 K. B. 614. The representatives of an alien can sue, under Lord Campbell's Act, for injuries causing his death on the high seas (*Davidsson* v. *Hill*, [1901] 2 K. B. 606). As to the rights of aliens generally, see *Jefferys* v. *Boosey*, 1854, 4 H. L. C. 815; 10 E. R. 681; *Union Colliery Co. of British Columbia* v. *Bryden*, [1899] A. C. 580; *Law Mag. and Rev.* xxvii. 223.]

[For legislation as to the immigration of aliens, see article IMMIGRATION.]

[See more fully Nelson's *Private International Law*, 1889, p. 41 *et seq.*; Piggott, *Imperial Statutes*, vol. i.] See also ACT OF STATE.

Alienage.—Alienage is the condition of being an alien, but the term is used in the Naturalisation Act, 1870, 33 & 34 Vict. c. 14, in the sense of becoming an alien. Sec. 4 of this Act provides for declarations

of alienage by any person who, by reason of his having been born within the dominions of His Majesty, is a natural-born British subject, but who also at the time of his birth became, under the law of any foreign State, a subject of such State, and is still such subject, and by any person who is born out of His Majesty's dominions of a father being a British subject (*q.v.*). It also provides (s. 3) for declarations of alienage by naturalised British subjects, formerly belonging to a State with which a convention has been entered into, to the effect that the subjects or citizens of that State who have been naturalised as British subjects may divest themselves of their status as such. Declarations of alienage are made in the United Kingdom in the presence of any justice of the peace; and if elsewhere in His Majesty's dominions, in the presence of any judge of any Court of civil or criminal jurisdiction, of any justice of the peace, or of any other officer for the time being authorised by law in the place in which the declarant is, to administer an oath for any judicial or other legal purpose; if out of His Majesty's dominions, in the presence of any officer in the diplomatic or consular service of His Majesty. [An Order in Council of August 17, 1870, made in pursuance of a convention of May 13, 1870 (P. P. 1870, c. 192; lxix. 471), empowered citizens of the United States, who have become naturalised British subjects, to divest themselves of such status by a declaration of alienage within two years thereafter. And see 35 & 36 Vict. c. 39, s. 2, and supplemental convention of February 23, 1871, set out in the schedule.]

[See *Regulations* issued by the Home Office in exercise of the powers contained in the Naturalisation Act, 1870. See Stat. R. & O. Rev. 1904, vol. i., "Alien," pp. 1 *et seq.*; also Piggott, *Imperial Statutes*, vol. i.]

Alienation in Mortmain.—Alienation in mortmain (*in mortuâ manu*) is, according to Blackstone, an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal (2 Black. *Com.* 268). For a further discussion, see MORTMAIN; CHARITIES.

Alike.—A testamentary gift to two or more alike, or to be enjoyed alike, is synonymous with its being given equally, and creates a tenancy in common (see Stroud, *Jud. Dict.*). See WILL, *Jud. Glos.*

Alimony is a pecuniary allowance, payable upon a separation, by one of the parties to a subsisting marriage, to or on behalf of the other party to the marriage. It is thus distinguished from "maintenance," which is the term applicable to a permanent allowance, ordered to be paid by the guilty party to the innocent party, after a final decree dissolving the marriage. Alimony is, in the great majority of cases, payable by the husband to the wife; but it may also, if the circumstances of the case warrant it, be payable by the wife to the husband (*Swift* v. *Swift*, [1891] Prob. 129; 63 L. T. Rep. 711; see also the remedy afforded in certain cases by the first Divorce Act, 20 & 21 Vict. c. 85, s. 45). Alimony is in the nature of a personal allowance, and is not assignable or alienable prospectively.

If the husband does not pay the permanent alimony which may have

been ordered by the Court after decree of judicial separation, he is liable for necessaries supplied to his wife (20 & 21 Vict. c. 85, s. 26). And it would also seem that he would be similarly liable, at common law, for his wife's necessaries, if, after an order for separation, pronounced by a Court of summary jurisdiction on the complaint of the wife, he fail to pay the amount which may thereupon have been ordered to be paid by him for her support. (See the statutes referred to *post.*)

Alimony being, in the case of a wife, a provision intended for her actual support, arrears beyond one year are not enforced unless in exceptional circumstances, and upon good cause being shown accounting for the delay in applying to the Court.

Enforcing Orders.—Rule 203 (*Additional Rules,* 1877).—A writ of *fieri facias,* or writ of sequestration, or writ of elegit (see EXECUTION), will be issued, as of course, in the Divorce Registry at Somerset House, upon an affidavit of service of the order and non-payment of the amount ordered. The Court will not issue an order for attachment upon non-compliance with an order for payment of alimony, as that would be contrary to the Debtors Act, 1869, 32 & 33 Vict. c. 62, s. 4. The Court will, however, entertain an application for a garnishee order (see EXECUTION) where a debt is shown to be due by a third person to the party disobeying the order for alimony.

An application for a committal order, to enforce an order for alimony, may be made, in the first instance, upon a judgment summons to the Court of Bankruptcy, or, if the party in default does not reside within the jurisdiction of the Court, the application *may* be made to the County Court of the district wherein he resides. The application must be supported by an affidavit stating that the summons has been personally served; and proof of means, in some cases by oral evidence, or in others by affidavit, must be adduced, showing that the party in default is able to discharge the debt, by instalments or otherwise. The defendant may appear, in opposition to the summons, and give oral evidence as to his means; and, whether he appear or not, the judge, on being satisfied as to the defendant's means, may make such order as may seem to him fit. If the defendant fail to obey this order, when it has been drawn up, and if he did not appear before, after it has been personally served upon him, another summons may be issued, and the defendant may be committed to prison.

By Rule 92 of the Rules and Regulations, 1865, made under the Matrimonial Causes Acts, 20 & 21 Vict. c. 85; 23 & 24 Vict. c. 144; and 38 & 39 Vict. c. 77, a wife may, at any time after alimony, whether pending suit or permanent, has been allotted to her, apply for an increase in amount; and similarly, the husband may apply for a decrease, if, since the date when the order was made, the means of the husband (or *semble* of the wife, where she has separate estate) have materially altered. The procedure upon such applications is the same as upon the original application for alimony. "Alimony *pendente lite*" applies to all matrimonial suits while pending; "*permanent* alimony" applies only after a decree of judicial separation.

Amount.—There is no hard and fast rule as to amount, but the usual practice of the Divorce Court is to allot one-fifth pending suit, and one-third after decree of judicial separation. Where the wife has separate means, the amount allotted pending suit is usually such as will make up her own income to the equivalent of one-third of the joint income of

husband and wife. Similarly, where the wife has separate means, the amount allotted by way of permanent alimony is usually such as will make up her income to the equivalent of one-third of the joint income. The amount allotted, in any or either case, may be made payable at such periods, *e.g.* weekly, monthly, or quarterly, as the Court may see fit to order, having regard to the particular circumstances of the case before it.

To whom Payable.—By the Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85, s. 24, and Rule 94, Divorce Court Rules, 1865, the Court may direct that any amount, allotted and ordered to be paid by way of alimony, be paid either to the wife herself, or to a trustee on her behalf, to be approved by the Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason this shall appear to the Court to be expedient. The trustee should not be the solicitor to the party in whose favour the order is made.

The Matrimonial Causes Act, 1878, 41 Vict. c. 19, extended the powers of Courts of summary jurisdiction, in cases where a husband was convicted of an aggravated assault upon his wife within the meaning of sec. 43 (not applicable to Scotland) of the Offences against the Person Act, 1861, 24 & 25 Vict. c. 100, to the granting of an order that the wife be no longer bound to cohabit with her husband, and gave such separation order the same force and effect as a decree of judicial separation on the ground of cruelty. The statute also enacted (s. 4, subs. 1) that such order might further provide that the husband should pay to his wife such weekly sum as the Court or magistrate might consider to be in accordance with his means and the means which the wife might have for her support; and the payment of any sum of money so ordered was enforceable against the husband in the same manner as the payment of money is enforced under an affiliation order. See AFFILIATION. The power to vary any such order for the payment of an allowance to the wife was restricted to the particular Court or magistrate by whom such order had been previously made, and, subject to this restriction as to the constitution of the Court before whom an application to increase or reduce the amount of the allowance was to be brought, the variation might be made from time to time, upon the application of the husband or wife, and upon proof that the means of either or both of the parties had materially altered since the original order, or any subsequent order varying it, had been made. This Act further provided, as an addendum to sec. 4, that no order for (*inter alia*) payment of money by the husband should be made in favour of a wife who should be proved to have committed adultery (*q.v.*; and see DIVORCE), unless such adultery had been condoned; and that any such order might be discharged—only, however, by the same Court or magistrate by whom the original order had been made—upon proof that the wife had been guilty of adultery since the making of the order. All orders made under this section are subject to appeal to a Divisional Court of the Probate, Divorce, and Admiralty Division. See APPEALS. It is curious to note, as a sample of the slovenly way in which Acts of Parliament are sometimes drafted and printed, that the word "Divorce" is omitted in the proviso of the section, the Division in which appeals are to be brought being there described as "the Probate and Admiralty Division."

The Married Women (Maintenance in case of Desertion) Act, 1886,

49 & 50 Vict. c. 52, s. 1 (not extended to Scotland), gave to any married woman, deserted by her husband, power to summon him before any two justices in Petty Sessions, or before any stipendiary magistrate, and gave to such justices or magistrate, if satisfied that the husband, being wholly or in part able to maintain his wife, or his wife and family, had wilfully neglected or refused so to do, and that he had in fact deserted his wife, power to make an order for separation, and it further enacted, in sub-sec. (1), that such justices or magistrate might also order the husband to pay to his wife such weekly sum, *not exceeding* £2, as the justices or magistrate should consider to be in accordance with his means, and with any means which the wife might be possessed of and have available for the support of herself and of her family; and the payment of any sum so ordered was made enforceable against the husband in the same manner as the payment of money is enforced under an order of affiliation. It is to be noted that, whereas the amount which might be ordered under the Matrimonial Causes Act, 1878, after conviction of the husband for an aggravated assault and after a separation order made thereupon, was not limited by the Legislature, the amount which the Court or magistrate might order under the Married Women (Maintenance in case of Desertion) Act, 1886, was limited to a sum of £2. The allowance in both cases was to be a "weekly" sum, and as the power conferred was statutory, it would seem as if the Court or magistrate would have had no jurisdiction to direct the amount ordered, to be paid otherwise than "weekly." But whereas the jurisdiction to make any variation of an order, made under the Act of 1878, was strictly limited to the identical Court or magistrate who made the original order, power was given, in sub-sec. (1) of the Act of 1886, to the justices or magistrate by whom any such order for payment should have been made, "or other justices or magistrate sitting in their or his stead," from time to time to vary the same, on the application of either the husband or the wife, and upon proof that the means of the husband or wife had altered in amount since the original order, or since any subsequent order varying it, should have been made.

The whole of this Act, as well as sec. 4 of the Matrimonial Causes Act, 1878, are now *repealed*, so far as *England only* is concerned: see the schedule to 58 & 59 Vict. c. 39.

The Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. c. 39, which does not apply either to Scotland or Ireland, greatly extends the powers heretofore exercised by Courts of summary jurisdiction to grant separation orders upon the complaints of wives against their husbands (see s. 4). It also provides, in sec. 5, subs. (c), that orders made under this Act by such Courts may contain (*inter alia*) a provision that the husband shall pay to the applicant personally, or, for her use, to any officer of the Court or third person on her behalf, such weekly sum, *not exceeding* £2, as the Court shall, having regard to the means both of the husband and wife, consider reasonable, provided that (s. 6) no orders shall be made under this Act on the application of a married woman if it shall be proved that such married woman has committed an act of adultery, which has not been condoned or connived at by the husband, or which he has not conduced to by his wilful neglect and misconduct. In considering the question of means, it has been held that the earnings of the husband, either actual or potential, may be taken into account (*Earnshaw* v. *Earnshaw*, 1896, 74 L. T. 560), and,

generally, in assessing the amount which a husband is to be ordered to pay for the support of his wife under the Summary Jurisdiction (Married Women) Act, 1895, Courts of summary jurisdiction are to be guided by the principles and practice which prevail in the Divorce Division in allotting permanent alimony after a decree of judicial separation (*Cobb* v. *Cobb*, [1900] P. 294).

Any Court of summary jurisdiction acting within the city, borough, division, or district in which any order under this Act, or under the Matrimonial Causes Act, 1878, s. 4, or the Married Women (Maintenance in case of Desertion) Act, 1886, has been made, may, on the application of the married woman (complainant) or her husband, and upon cause being shown upon fresh evidence (as to the judicial interpretation of "fresh evidence," see *Johnson* v. *Johnson*, [1900] P. 19) to the satisfaction of the Court, at any time, alter, vary, or discharge any such order, and may, upon any such application, from time to time increase or diminish the amount of any weekly payment ordered to be made, so long as the same do not in any case exceed the weekly sum of £2; and if any married woman, upon whose application an order shall have been made under this Act, or either of the two other Acts mentioned, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall, upon proof thereof, be discharged. The procedure under this Act is to be in accordance with that prescribed under the Summary Jurisdiction Acts (see SUMMARY JURISDICTION), and the payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money under an affiliation order is enforced.

Any Court of summary jurisdiction may refuse to make an order in cases which, in the opinion of such Court, are more fit to be heard and determined in the High Court; but the High Court has power to direct the Court of summary jurisdiction to re-hear and determine the application. Appeals lie from the Courts of summary jurisdiction, upon any order or refusal to make an order, to a Divisional Court of the Probate, Divorce, and Admiralty Division of the High Court of Justice. Upon the hearing of every summons under the Summary Jurisdiction (Married Women) Act, 1895, it is the duty of the clerk to the justices or magistrate to make a note, not only of the evidence as it is given, and of the decision when arrived at, but also of the reasons which led the justices or magistrate to arrive at the decision. A copy of the note made by the clerk is to be furnished by him, on application being made for the same by either of the parties to the summons, or by the solicitor for either party. (See *Harling* v. *Harling*, 74 L. T. Rep. 55; *Robinson* v. *Robinson*, [1898] P. 153; *Cobb* v. *Cobb*, [1900] P. 145.) Rules of Court may from time to time be made, regulating the practice and procedure upon such appeals. See APPEALS.

For fuller information as to the practice and procedure in regard to alimony, see Oakley, *Divorce Practice*, and Brown and Powles on *Divorce*.

FORMS.

I. Petition for Alimony.

In the High Court of Justice.
Probate, Divorce, and Admiralty Division.
(*Divorce.*)

To the Right Hon. the President of the said Division.

Between Ann Jones, *Petitioner;*
and
John Jones, *Respondent.*

The day of 19 .

The petition of Ann Jones, the lawful wife of John Jones,

Showeth:—

1. That the said John Jones has for many years carried on the business of a , and he derives from such business a nett annual income of £ .

2. That the said John Jones is the owner of the freehold house known as , in the city of , and that the same is of the value of £ , and is estimated to be of the rental value of £ .

3. That the said John Jones is possessed of furniture and effects in his said dwelling-house of the value of £ .

4. That the said John Jones is possessed of money at his bankers, and of divers sums of money to a considerable amount invested in shares, debentures, or other stock of railways, insurance or other companies, and in the public funds of Great Britain or elsewhere, and in bonds, bills, notes, or other securities.

5. That the said John Jones is possessed of various policies of insurance upon his own life to a considerable amount.

Your petitioner therefore prays that your Lordship will be pleased to allot to her such sum or sums of money by way of alimony *pendente lite* as to your Lordship may seem meet.

[If the petition is for permanent alimony, the decree should be recited in the body of the petition, and the words "permanent alimony" should be substituted for "alimony *pendente lite*" in the prayer.]

[*Note.*—Petitions for alimony do not require to be verified by affidavit, and need not even be signed.]

II. Answer to Petition for Alimony.

In the High Court of Justice.
Probate, Divorce, and Admiralty Division.
(*Divorce.*)

The day of 19 .

Between Ann Jones, *Petitioner;*
and
John Jones, *Respondent.*

I, John Jones, the above-named respondent, in answer to the petition

for (permanent) alimony (*pendente lite*) filed in this cause, make oath, and say as follows:—

1. I admit that I carry on the business of a at , in the city of , but I deny that I derive therefrom the nett annual income of £ , and I say that my average profits from the said business during the past three years amount to the sum of £ per annum and no more.

2. The petitioner is in receipt of a yearly income amounting to £ , as hereinafter set forth.

3. The following two schedules contain accurate accounts, to the best of my knowledge, information, and belief, of the income of which I am in receipt, and of the sources from which the same is derived, and of the income of which the petitioner is in receipt, and of the sources from which it is derived.

[*Insert schedules.*]

4. I claim to make the following deductions from my nett annual income.

[*Insert items of deductions.*]

5. I have no property and no income save as herein set forth.

[*Note.*—A reply, except by leave, is only allowed in respect of an allegation that the petitioner has separate property or income, and the reply as to this must be upon oath.]

A preliminary appointment is taken by the solicitors before the registrar, and, upon this appointment, the question as to sufficiency of the pleadings is considered, and thereupon further and fuller answer and/or reply may be ordered, or production and inspection of documents may be directed, or an order may be made for one or both of the parties to attend at such time as the registrar may fix, for the purpose of being cross-examined upon the answer and/or reply.

If a full enquiry takes place upon a petition for alimony pending suit, this may be taken as the basis for allotment of permanent alimony after decree; but of late the tendency has been to defer the detailed investigation before the registrar until after decree, and to make an allotment pending suit upon a *primâ facie* consideration of the pleadings; since, if the figures, upon which such allotment pending suit is based, turn out, upon a full investigation, after decree, to be under-estimated, the difference will be ordered to be made up; and it would seem that, conversely, if an allotment in excess has been made, the excess would be allowed to be deducted.

Alimony *pendente lite* ceases at the date of the decree or dismissal of the petition, and permanent alimony is calculated as commencing from the date of the decree.

Aliunde, Rule of.—See CONDITIONS OF SALE.

Alkali, etc., Works.—Alkali works and certain other works in which noxious or offensive vapours are evolved, are now (July 1906) regulated by the Alkali, etc., Works Regulation Acts, 1881, 44 & 45 Vict. c. 37, and 1892, 55 & 56 Vict. c. 30. The Act of 1881, which was founded upon a report of a royal commission issued in 1878, repealed and consolidated, with substantial amendments, the Alkali Act, 1863 (originally temporary, but made perpetual by the Alkali Act, 1868), and the Alkali Act, 1874. On and after January 1907 such works will be regulated by the Alkali Works Regulation Act, 1906, which repeals and re-enacts, with considerable amendments, the Acts of 1881 and 1892.

The central authority for the administration of the Act of 1906 is, for England and Ireland, the Local Government Boards for each country; and for Scotland, the Secretary for Scotland (ss. 27, 28).

The Act deals with six classes of works:—

1. Alkali Works, *i.e.* every work (*a*) for the manufacture of alkali, sulphate of soda or sulphate of potash, in which muriatic acid gas is evolved; or (*b*) for the treatment of copper ores by common salt or other chlorides in which muriatic acid gas is evolved (s. 27 (1)).

In such works provision is to be made for the condensation, to the satisfaction of the chief inspector—

Of the muriatic acid gas evolved to the extent of 95 per cent., and to such an extent that in each cubic foot of air, smoke, or chimney gases escaping from the works into the atmosphere, there is not contained more than one-fifth part of a grain of muriatic acid (s. 1 (1));

In addition to above, the owner of every alkali work is to use the best practicable means (defined in sec. 27) for preventing the escape of noxious and offensive gases, by the exit-pipe of any apparatus used in any process carried on in the work, and for preventing the discharge, whether directly or indirectly, of such gas into the atmosphere, and for rendering such gases when discharged harmless and inoffensive.

This obligation is qualified by protecting from proceedings where the muriatic gas discharged by chimneys or flues does not exceed the amount specified (s. 2 (1)).

Noxious or offensive gases *include* the following gases or fumes: muriatic acid, sulphuric acid, sulphurous acid (except that arising solely from the combustion of coal gas) and numerous other gases and fumes specified in sec. 27 (1), among them being fumes from cement works.

Alkali Waste is not to be deposited or discharged without the best practicable means being used for effectually preventing any nuisance arising therefrom (s. 4), and provision is made for dealing with nuisances created by its deposit or discharge (s. 5).

2. All Works of Whatever Description, in which a liquid is produced containing acid, or any other substance capable of liberating sulphuretted hydrogen from alkali waste or the drainage thereof, must be carried on in such a manner that the liquid shall not come into contact with alkali waste or with the drainage thereof, so as to cause a nuisance (s. 3 (1)).

On the request of the owner, the sanitary authority of the district is to provide and maintain, at the expense of the owner, a drain for carrying off the liquid into the sea, or into any river into which the acid can be carried without contravention of the Rivers Pollution Prevention Act, 1876, as amended by subsequent legislation (s. 3 (2)).

3. Sulphuric Acid Works, *i.e.* any works in which the manufacture

of sulphuric acid is carried on by the agency of oxides of nitrogen and the use of a lead chamber (sched. 1 (1)). Such works are to be carried on so as to secure the condensation, to the satisfaction of the chief inspector, of the acid gases of sulphur, or of sulphur and nitrogen, evolved in the process of manufacture to such an extent that the total acidity of such gases in each cubic foot of residual gases, after completion of the process and before admixture with air, smoke, or gases escaping into the chimney, does not exceed what is equivalent to four grains of sulphuric anhydride (s. 6, sched. 1). The mode of calculating the proportion of acid in air, smoke, or gases, is prescribed by sec. 16.

4. Muriatic Acid Works, as defined in sched. 1 (8), *i.e.* works other than alkali works in which liquid muriatic gas is evolved, tin plate flux works in which muriatic acid gas is evolved, and salt works in which salt is extracted from brine and muriatic gas is evolved. Such works are to be carried on in such a manner as to secure the condensation, to the satisfaction of the chief inspector, of the muriatic gas evolved in such work, to such extent that in each cubic foot of air, smoke, or chimney gases escaping from the work into the atmosphere, there is not contained more than one-third grain of muriatic acid (s. 6 (2)).

5. Other Works.—The owner of any work specified in the first schedule to the Act is to use the best practicable means for preventing the escape by the exit flue of any apparatus in any process carried on in the work, the discharge, directly or indirectly, into the atmosphere of all noxious and offensive gases evolved, or for rendering such gases when discharged harmless and inoffensive. The works scheduled are sulphuric acid (of two classes), chemical manure, gas liquor, nitric acid, sulphate of ammonia, muriate of ammonia, chlorine, muriatic acid (of three classes), sulphide, alkali waste, Venetian red, lead deposit, arsenic, nitrate and chloride of iron, bisulphide of carbon, picric acid, sulphocyanide, bisulphite, paraffin oil, tar and zinc. Works in which sulphuric acid is concentrated by the overheat-pan process are temporarily and partially exempt (s. 26).

6. Cement Works, *i.e.* works in which aluminous deposits are treated for the purpose of making cement. See Smelting Works.

Where it appears that means can be adopted at a reasonable expense for preventing the discharge of the gases evolved in such works, or for rendering them innocuous when discharged, the Board may from time to time, by order, require the owner to adopt the necessary means for such purpose, and may also by the order extend to such works such provisions of the Act relating to scheduled works as they see fit (s. 8). Such an order is provisional only, and requires for its validity to be confirmed by Parliament, and may be repealed, altered or amended by a subsequent order similarily confirmed.

Registration of Works.—An alkali work, a scheduled work, and a cement work is not to be carried on unless certified to be registered. Accordingly, the work must be registered in a register containing the particulars prescribed by the central authority, and the owner must, in January or February in every year, apply for a certificate of registration, the certificate issued remaining in force for one year from the 1st of April following the application (s. 9).

In the case of works erected after the commencement of the Act, the owner must apply for a certificate of registration before commencing

any manufacture or process therein, the certificate being issued as soon as may be, and remaining in force until the 1st April next. In the case of a new work, application for registration may be made at any time before the work is carried on.

Notice of Change in Ownership.—Written notice of any change of ownership, or of any change in the other particulars stated in the register, is to be sent by the owner to the Local Government Board within one month after the change, and the register and the certificate are to be altered accordingly, without charge and without the issue of a new certificate. If such notice is not sent, the work is not to be deemed to be certified to be registered (s. 9 (7)).

Stamp Duty.—The Act imposes in respect of every such certificate in the case of an alkali work a stamp duty of £5, and in the case of other works the duty of £3 (s. 9 (6)).

Inspection.—Secs. 10-14 deal with the appointment of inspectors for the execution of the Act, their duties, powers, and remuneration. Certain persons are declared ineligible for the post of inspector, *e.g.* anyone who practises as a land agent, or who is engaged in any work to which the Act applies. Owners are required to furnish all reasonable facilities for inspection, and, on the application of sanitary authorities, an additional inspector may be appointed (s. 14).

The chief inspector in England is required to make an annual report to the Local Government Board of the proceedings of himself and the other inspectors under the Act, which must be laid before Parliament.

Special Rules.—The owner of an alkali or of a scheduled work may, with the sanction of the central authority, make, and when made, alter, add to, and repeal special rules for the guidance of his workmen employed, *e.g.* in any process causing the evolution of noxious or offensive gases, and may annex fines, which are recoverable summarily, to the violation of such rules. No fine to exceed £2 (s. 15 (1) (3)).

A printed copy of such rules must be given to every person affected thereby (s. 15 (2)).

Recovery of Fines for Offences (other than offences against a special rule, *v. sup.*), (s. 20).—Various fines, ranging from £5 to £100, are imposed for contravention of the provisions of the Act, and are recoverable in England and Ireland by action in the County Court. The action is to be brought, with the sanction of the central authority, by the chief inspector, or by such other inspector as the central authority may direct, and (except in cases of fine for contravening the provisions as to registration) there is an appeal to the High Court against decisions or directions in point of law (s. 21 (5)), within three months after the commission of the offence. For the purposes of the action, the fine is deemed a debt due to the inspectors (s. 17 (3)). All fines, except those recoverable summarily, are to be paid into the Exchequer (s. 19). In Scotland, proceedings under the Act are taken before the sheriff (s. 28). All fines, except those recoverable summarily in England or Ireland, are to be paid into the Exchequer (ss. 19, 28*c*).

It is sufficient in any proceeding under the Act in relation to a fine for an offence, other than an offence against a special rule, to allege that any work is a work to which the Act applies, and to state the name of the registered or ostensible owner, or the title of the firm

by which the employer of persons in the work is usually known (s. 18).

Discharge of Owner on Conviction of Actual Offender.—The owner is to be deemed the offender and liable for the fine unless he can prove that, notwithstanding due diligence on his part, the offence was committed by a named agent, and without his knowledge, consent, or connivance; provided that the inspector may proceed in the first instance against the actual offender without first proceeding against the owner (s. 20).

Complaint by Sanitary Authority.—When a nuisance is occasioned by a contravention of the Act, the sanitary authority may lay a complaint before the central authority (s. 22). The expression "sanitary authority" is defined in sec. 26.

Action in Case of Contributory Nuisance.—Sec. 23 confers a right of action upon any person injured by a nuisance, against any one or more of several persons who may have contributed to it, although the act or default of one of the offenders alone would not separately have caused a nuisance.

Saving as to General Law.—Sec. 29 preserves all remedies at law apart from those provided by the Act.

All.—For the various legal effects of the use of "all," see Jarman on *Wills*, and Stroud, *Jud. Dict.* "All" is equivalent to each and every (*Burnett* v. *G. N. of Scotland Railway*, 54 L. J. Q. B. 539), but by a context it may mean "any."

Allegation.—The technical term in ecclesiastical suits for the defendant's answer to the libel (*q.v.*) or charge.

Allegiance or Ligeance (from the old French *lige, ligeance*) is the lawful obedience which a subject is bound to render to his sovereign.

Allegiance is of three kinds: natural, acquired, or local. *Natural* allegiance is that which every subject born from his birth owes to his sovereign. He is said to be a natural liegeman, as the sovereign is said to be his natural liege lord. It is *acquired* where one is naturalised (see NATURALISATION), or made a DENIZEN (*q.v.*); and that owing by every resident in the British dominions for the protection he enjoys is called *local* (Blackstone).

It is customary, however, at the present day to restrict the use of the word to the first and second of these: the bond which attaches a subject to his sovereign, though some authors still speak of local allegiance as due by both British subjects and aliens alike while within the dominions of the Crown, to distinguish it from the allegiance due by British subjects on foreign soil, and entitling them also to protection there.

Under British law, until the Naturalisation Act of 1870, 33 & 34 Vict. c. 14, no natural-born British subject could divest himself of his allegiance; but since that Act he may make a declaration of ALIENAGE (*q.v.*), and thereafter ceases to be a British subject.

Aliens, on naturalisation, are required to take an oath of allegiance. (Naturalisation Act, 1870, 33 & 34 Vict. c. 14, s. 9; Naturalisation

Oaths Act, 1870, 33 & 34 Vict. c. 102; and Regulations issued by the Home Office in exercise of the powers contained in the Naturalisation Acts, 1870; Stat. R. & O. Rev. 1904, vol. i., "Alien," pp. 1 *et seq.*) See OATH OF ALLEGIANCE.

Alliance (from Lat. *alligo*, to tie or unite together), a state of connection with another by a league; a union between two or more States for a common object.

All States, as independent communities, have the right to contract alliances.

A protected or federal State, if it has retained its sovereignty, is also competent to contract with other States. "The proper and strict test to apply," says Phillimore, "will be the capacity of the protected State to negotiate, to make peace or war with other States, irrespectively of the will of its protector. If it retain that capacity, whatever may be the influence of the protector, the protected State must be considered as an independent member of the European commonwealth" (*International Law*, i. 91). [See Baty, *International Law in South Africa*, ch. ii., for a discussion of the question of suzerainty in connection with protected States.]

Alliances are generally classed as offensive or defensive, or both.

An alliance is different from a Confederation, which generally takes the form of a single State in its relations with other States.

Allocatur.—The name formerly applied to what is now generally known as the certificate of a taxing-master in the Chancery, King's Bench, and Bankruptcy Divisions of the High Court, and in the Houses of Lords and Commons in relation to the judicial business or private Bill legislation, and of the registrars in the Probate, Divorce, and Admiralty Divisions, in the District Registries, and in the County Courts. It allows or certifies the bill of costs, brought in for taxation, to have been taxed, and that, after deduction of the items which have been disallowed, a certain amount is due thereon. The term allocatur is still sometimes employed on taxation as between solicitor and client. The taxation is not completed until the allocatur or certificate is made and signed; so that until then taxation will not be reviewed (*Sellman* v. *Boorn*, 1842, 8 Mee. & W. 552). It is final and conclusive as to amount, unless set aside or altered by order, decree, or rule of Court. As to disallowance of costs for misconduct after allocatur, see *Ex parte Harper*, 1882, 20 Ch. D. 685.

The certificate, or allocatur, is not by itself enforceable by execution or otherwise. Thus where, on a mere rule for taxation, an allocatur was given, certifying the amount of the bill taxed, it was held that the allocatur was not a rule or order within sec. 18 of 1 & 2 Vict. c. 110, so as to become enforceable as a judgment (*Shaw* v. *Neal*, 1858, 6 H. L. 581; 10 E. R. 1422). And where a judgment was obtained for payment of money and costs to be taxed, and after taxation the judgment creditor had failed to take the necessary step of having the certificate of costs entered up on the judgment in the ordinary way, it was held that a bankruptcy notice issued for the costs was bad, as the judgment was not in form to carry execution for the costs, and therefore bankruptcy notice in respect of such costs could not be issued (*Re Crump*, 1891, 64 L. T. 799).

By Order 65, r. 27 (39), of R. S. C., 1883, objections may be taken by any party as to the allowance or disallowance of items by the taxing-master before the certificate or allocatur is signed; and the taxing-master may review his taxation. Within fourteen days from the date of the certificate or allocatur (r. 27 (41)), or within such further time as may be allowed, the dissatisfied party may apply to a judge at chambers to review the taxing-master's certificate or allocatur. It is final and conclusive as to all matters which have not been objected to.

See COSTS; TAXATION.

Allodial or Alodial Lands.—Allodial lands are lands held absolutely by the possessor of them and not of any lord. A distinction undoubtedly existed at one period on the Continent between alodial lands and lands which were *beneficia* or fiefs, that is lands holden of a lord. Thus the owner of alodial land was subject only to a fine for neglecting the *heerbann* (levy), while the owner of a *beneficium* was liable to the penalty of forfeiture. It has been surmised that in England in pre-Norman days lands known as book-land were allodial lands, while the occupier of folk-land stood in the position of the owner of a *beneficium*. The question is, however, no longer of practical importance, as, though allodial land may still possibly exist in Scotland, the common law has, since the twelfth century, recognised that the king is the "sovereign lorde or lorde paramount, either mediate or immediate, of all and every parcell of land within the realme" (Co. Lit. 65*a*). No claim on the part of a person in possession of any lands as against the Crown, claiming by escheat, would be recognised on the plea that the land was allodial or not held of any lord. (Stubbs' *Constitutional History of England*, vol. i. chap. vii.; Challis's *Law of Real Property*, 2nd ed., p. 5.)

Allonge.—A slip of paper annexed to a bill of exchange for the inscription of such indorsements as there is not room for on the bill. An allonge becomes part of the bill and requires no additional stamp. Allonges are more frequently met with in countries where the Code Napoleon is in force than elsewhere, inasmuch as the Code requires an indorsement to express the consideration, holding it to be otherwise a mere procuration (Bills of Exchange Act, 1882, s. 32 (1); Byles on *Bills*, 16th ed., p. 176).

Allotments.—The word allotment signifies a parcel of land appropriated for any specific purpose. In connection with the enclosure of commons, the Inclosure Act, 1845, authorises allotments—

1. For public exercise and recreation (s. 30);
2. For the labouring poor (s. 31);
3. For repair of roads (s. 72);
4. For other public purposes (*ibid.* s. 34);
5. After the several allotments before-mentioned, to the lord of the manor in lieu of his interest in the soil (s. 76); and lastly, after satisfaction of all the above purposes,
6. To the several persons interested, in proportion to their respective rights and interests (s. 77).

The word allotment is chiefly used in recent legislation, *e.g.* in the

Allotment Acts of 1887, 50 & 51 Vict. c. 48, and 1890, 53 & 54 Vict. c. 65, and the Local Government Act, 1894, 56 & 57 Vict. c. 73, in the second sense, namely, an allotment for the labouring poor. The earlier legislation on the subject may be summarised as follows:—

(1) The Act 59 Geo. III. c. 12, after referring to the Poor Law Act of Elizabeth, 43 Eliz. c. 2, whereby the churchwardens and overseers were to set certain poor to work, empowers the churchwardens and overseers, with the consent of the inhabitants in vestry assembled, to take into their possession lands belonging to the parish or the poor, or to purchase or hire suitable lands not exceeding twenty acres, increased by 1 & 2 Will. IV. c. 42, to fifty acres, for the employment of the poor; and to let portions of such land to poor and industrious inhabitants, on reasonable terms and conditions to be determined by the vestry.

(2) 1 & 2 Will. IV. c. 42, gives power to churchwardens and overseers to enclose waste lands to the extent of fifty acres, subject to the consent of the lord of the manor and the major part in value of the persons having right of common, and to cultivate and improve for the benefit of the parish and the poor, and to let the same as in the last-mentioned Act provided.

(3) 1 & 2 Will. IV. c. 59, extends the powers conferred by the last Act over forest or waste lands belonging to the Crown, in or near to the parish, subject to the consent of the Treasury.

(4) 2 Will. IV. c. 42, after reciting that in parishes enclosed under (private) Acts of Parliament, there are in many cases allotments made for the benefit of the poor, chiefly with a view to fuel, requires the trustees of any such allotment, together with the churchwardens and overseers of the poor, in parish vestry assembled, to let portions not exceeding one acre as a yearly occupation to industrious cottagers of good character, being day-labourers or journeymen legally settled in the parish.

Provision is made by the Poor Allotments Management Act, 36 Vict. c. 19, s. 3, for the appointment of committees by allotment trustees and by the vestry, where the number of either body exceeds twenty, to constitute an allotment authority.

2 Will. IV. c. 42, also provides (s. 3) for the holding of a vestry meeting every year, for the purpose of receiving applications for tenancies. The same Act also dealt with the payment and application of the rent for the purpose of fuel, and, subject to certain exceptions, extended its proviso to allotments acquired under the earlier Acts; but the rents of lands acquired under these Acts must be applied to the relief of the poor-rate (36 Vict. c. 19, s. 14).

(5) By 5 & 6 Will. IV. c. 69, it was enacted that all powers and authorities given by the four previous Acts should in future be exercised (subject to the control of the Poor Law Commissioners, now the Local Government Board) by the guardians of the poor.

It was decided that the legal estate in parish property was not transferred by this statute from churchwardens and overseers to the guardians (*Doe & Norton* v. *Webster*, 1840, 12 Ad. & E. 442; 9 L. J. Q. B. 373; *Worge* v. *Relf*, 1842, 11 L. J. M. C. 125).

As a matter of fact, the guardians never used the powers in respect of allotments conferred on them by this Act; but these powers continue to subsist.

In construing these Acts, it should be borne in mind that the vestry

in a rural parish is now for the purpose of these Acts superseded by the parish council (*q.v.*); that the duties, powers, and liabilities of the churchwardens and overseers, in regard to the holding or management of parish property (other than ecclesiastical), and the holding or management of village greens or allotments, are transferred to the parish council by the Local Government Act, 1894, s. 6 (1), c. 3; and that in a rural parish, which has not a parish council, the legal interest in all property which would be vested in the parish council, if there were one, vests in the chairman of the parish meeting and overseers, subject to all trusts and liabilities (*ibid.* s. 19 (7)); that the duty of appointing allotment wardens (see *post*), or any committee or managers for the purpose of allotments, is transferred to the parish council (*ibid.* s. 6 (4)), whilst *trustees*, who hold any property for the purpose of allotments, whether under the Inclosure Acts or otherwise, for the benefit of the inhabitants of a rural parish, *may*, with the approval of the Charity Commissioners transfer such property to the parish council or their nominees (*ibid.* s. 14 (1)). Lastly, the guardians in rural districts are superseded by the district council (*q.v.*) (*ibid.* 5, 24).

Under the provisions as to allotments in the Inclosure Act, 1845, 8 & 9 Vict. c. 118, and amending Acts—

(*a*) The Inclosure Commissioners, now the Board of Agriculture (*q.v.*), may require the appropriation of an allotment for the labouring poor as a condition of the inclosure, and if the Board abstain from doing so in any case, they must state the grounds of such abstention in their annual report (8 & 9 Vict. c. 118, c. 31). And the meeting of persons interested in the land to be enclosed, convened by the Board, may instruct the valuers appointed to divide the land, subject to the approval of the Board, to appropriate part for allotments or field gardens for the labouring poor (*ibid.* s. 34).

(*b*) Such allotments are under the Acts to be vested in the churchwardens and overseers (*ibid.* s. 73), and managed by allotment wardens, namely, the incumbent of the parish or ecclesiastical district, and one churchwarden and two other ratepayers of the parish (s. 108), who are to let to poor inhabitants of the parish, in gardens not exceeding one acre in extent, on yearly tenancies, subject to certain regulations laid down in the Act (8 & 9 Vict. c. 118, ss. 109, 110, 111).

(*c*) Surplus rents are to be applied in improving the field gardens, or hiring or purchasing additional field gardens (39 & 40 Vict. c. 56, s. 27).

The Allotments Extension Act, 1882, 45 & 46 Vict. c. 80, requires trustees of lands held for the benefit of the poor to set aside a suitable portion for allotments (s. 4), upon terms (s. 13), similar to those contained in the Inclosure Acts. They may also make rules, which must be submitted to the Charity Commissioners, who may disallow any rules by order (s. 9).

If the trustees neglect to set apart land under this Act, the Charity Commissioners, upon the application of any four cottagers or labourers, who would be entitled to an allotment, may issue an order (s. 10) against them for the remedy of such neglect, enforceable as an order under the Charitable Trusts Acts. But the trustees may be excused by a certificate granted by the Charity Commissioners, that the land is so unsuitable for allotment, that no part thereof can be usefully set apart for the purposes of the Act (s. 11). In practice, such certificate is only granted upon the

report of a surveyor. Sec. 43 (*b*) exonerates the trustees from setting aside a portion of the charity land to the injury of the remainder.

The Allotments Compensation Act, 1887, 50 & 51 Vict. c. 26, defines the term "allotment" for the purposes of the Act, to mean any parcel of land, of not more than two acres in extent, held by a tenant under a landlord, and cultivated as a garden or as a farm, or partly as a garden and partly as a farm. This Act (which gives compensation for crops left in the ground at the end of a tenancy) applies to allotments the principle of tenants' compensation for improvements established by the Agricultural Holdings Act, 1883 (see TENANT RIGHT). See also Tenants' Compensation Act, 1890, as to tenants and mortgagees.

Recent legislation as to allotments for the labouring poor is chiefly contained in the Allotments Act, 1887, 50 & 51 Vict. c. 48, as modified by the Allotments Act, 1890, 53 & 54 Vict. c. 65, and by the Local Government Act, 1894, 56 & 57 Vict. c. 73.

The effect of these statutes taken together is as follows:—

It is the duty of any urban or rural sanitary authority, on a representation made to them in writing under the Allotments Act, 1887, by any six parliamentary electors or ratepayers, resident in the case of an urban district in that district, or in the case of a rural district in some parish thereof, or in a rural district by the parish council, to take such representation into consideration; and if they are of opinion, after inquiry made in consequence of such representation, or of their own initiative, that there is a demand for allotments for the labouring population in the district, and that such allotments cannot be obtained at a reasonable rent, and on reasonable conditions, by voluntary arrangement between landowners and applicants for such land, they may acquire land suitable for such purpose by purchase or hire, within or without their district or parish, and let it in allotments to the labouring population resident in the district or parish (s. 2 (1)), but such land is not to be acquired except on such terms as will make it reasonable, in the opinion of the authorities, to expect that all expenses, except expenses incurred in making roads for the use of the public, may be recouped out of the rents obtained.

A question may arise as to whether specific performance can be enforced against an authority which has given notice to treat under this section, and aferwards refuses to complete, on the ground of inability. The answer seems to depend on the Court, whether the authority would be held as a private promoter or a trustee for the public (see *Morgan* v. *Metropolitan Ry. Co.*, 1868, L. R. 3 C. P. 553; L. R. 4 C. P. 97; *R.* v. *Hungerford Market Co.*, 1832, 4 Barn. & Adol. 327; 38 R. R. 253; and with *R.* v. *Commissioners of Woods and Forests*, 1851, 15 Q. B., at p. 774; 81 R. R. 802; Brooke Little's *Allotment Acts*, 192).

For the purpose of the purchase of land by agreement, sec. 178 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, and the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, are incorporated in this Act.

In the event of the sanitary authority being unable to acquire suitable land, by agreement on reasonable terms, it may petition the county authority, now the county council (*q.v.*), on the subject. The county council, acting by its standing committee (Allotments Act, 1890, s. 3), will, after certain preliminary proceedings, regulated by sec. 9 of the Local Government Act, 1894, hold a public inquiry, at which all

persons interested shall be permitted to attend. The costs of such inquiry are regulated by sec. 274 of the Public Health Act.

After the inquiry the council may make an order putting into effect the compulsory clauses of the Lands Clauses Consolidation Acts. If the county council refuse to make such order, the parish or district councils, but no other persons, may appeal to the Local Government Board, who may, after local inquiry, make the order; but any order on the part of the Local Government Board overruling a county council, shall be laid before Parliament. A copy of this order, when made, must be served in the prescribed manner on such persons as the local board may direct, with a statement that the order will become final and have the effect of an Act of Parliament, unless a memorial for further inquiry is presented to the Local Government Board by some person interested. If no memorial is presented, or, being presented, is withdrawn, the Local Government Board shall without inquiry confirm such order. Otherwise the Board shall hold an inquiry, and confirm, amend, or disallow the order, and any order so made shall have the effect of an Act of Parliament (Local Government Act, 1894, s. 9 (5)-(7)).

The rent is recoverable by the district council as landlords in like manner as in any other case of landlord and tenant (Allotments Act, 1887, s. 8 (1)). See LANDLORD AND TENANT.

The district council may make and vary regulations for the management of allotments, subject to the approval of the Local Government Board (s. 6 (1)). But the Act provides that the rent shall be fixed at an amount not less than such as may reasonably be expected to insure the district council against loss (s. 7 (1); s. 7 (2)); that no one person shall hold any allotment exceeding one acre, and an allotment shall not be sublet (s. 7 (13)); that if an allotment cannot be let in accordance with the provisions of the Act, it may be let to any person at the best annual rent obtainable, but so that possession may be resumed within twelve months (s. 7 (4)).

The district council may appoint and remove allotment managers, consisting of their own members, with or without other persons, or wholly of other persons. In a rural parish provision is made for the election of allotment managers, but by virtue of the Local Government Act, 1894 (s. 6, subs. 4), the parish council are now the allotment managers, and the electoral provisions will accordingly only apply in rural parishes where there is no parish council.

The Act further gives power (s. 12) to the district council to submit a scheme to the county council for the provision of common pasture, and the county council may thereupon make an order authorising the district council to carry such scheme into effect.

The district council may borrow for the purposes of acquiring, improving, and adapting land under the Act (s. 10, subss. 4 and 5).

There is a right of appeal to the county council (Allotments Act, 1890) in cases where the district council (but not a borough council) fail to acquire land, upon representation made to them; and if, after inquiry, the county council are satisfied that the land ought to be acquired, the powers of the district council under the principal Act are transferred to the county council. But by sec. 9, subs. 14, of the Local Government Act, 1894, where there is a parish council, the land must be assured to the parish council, in whom thereupon all powers of management become vested.

By the Allotments Rating Exemption Act, 1891, it is provided that allotments shall be rated at one-fourth of the net annual value of the land, as under the Public Health Act, 1875, s. 230.

The parish council have also, under the Local Government Act, 1894, the power to hire land for allotments (s. 10, c. 1). If they are unable to obtain them by hire, on reasonable terms, they may represent the case to the county council, and the county council may make an order authorising the parish council to hire compulsorily for allotments for a period not less than fourteen, and not more than thirty-five, years, such land in or near the parish as is specified in the order, such order being subject, as to confirmation by the Local Government Board and otherwise, to the same regulations as an order by the county council for the compulsory purchase of land for allotments.

Hired land may be let in allotments exceeding one acre to one person, but if hired compulsorily, not exceeding four acres of pasture, or one acre of arable and three acres of pasture. Also a stable, cowhouse, or barn, may be erected on a hired allotment, but not on any allotment purchased under these Acts (Local Government Act, 1894, s. 10 (6)).

Game Rights.—Where land has been allotted under the Inclosure Acts, territorial rights such as shooting or fishing are not reserved to a lord of the manor under a clause which secures to him royalties, franchises, etc. See *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554.

FORMS.

[NOTE.—*Forms I. to IV. relate only to Allotments acquired since the Act of* 1887.]

I. *Representation by Parliamentary Electors or Ratepayers to a District Council that Allotments are Required.*

To the Urban [or, Rural] District Council, in the county of .

WE, the undersigned, being six parliamentary electors or ratepayers resident in the said urban district [*or*, in the parish of , in the said rural district], hereby represent to the said district council that the circumstances of the urban district [*or*, parish] are such that it is the duty of the said district council to acquire land for allotments, and to let such land in allotments to persons belonging to the labouring population resident in the said urban district [*or*, parish] and desiring to take the same.[1]

And further,

We represent that there is a demand for allotments for the labouring population in the said urban district [*or*, parish], and that such allotments cannot be obtained at a reasonable rent or on reasonable conditions by voluntary arrangement between the owners of land suitable for such allotments and the applicants for the same.

[1] Allotments Act, 1887, 50 & 51 Vict. c. 48, s. 2 (1), and Local Government Act, 1894.

And further,

We represent [*add such further particulars as may be justified by local conditions in support of the application*].

Dated this day of 19 .

(*Signed*) [1] Parliamentary elector [*or*, ratepayer] resident in the said urban district [or, parish].

II. *Representation by Parish Council to Rural District Council that Allotments are Required.*

To the Rural District Council in the county of .

WE, the undersigned, on behalf of the Parish Council, in the Rural District of , hereby represent to the said Rural District Council that the circumstances of the parish are such [etc., *and continue as in Form I.*].

And further,

We represent [etc., *and continue as in Form I.*].

And further,

We represent [etc., *and continue as in Form I.*].

Dated this day of 19 .

Signed, at a meeting of the said parish council held on the day of 19 , on behalf of the said council. } [*Chairman of the said meeting.*] [*Two Councillors present at the said meeting.*]

III. *Petition to County Council by Parish Council* [*or by Six Parliamentary Electors or Ratepayers*] *to Provide Allotments where the District Council fails or refuses to provide the Same.*

(*Allotments Act*, 1890, 53 & 54 *Vict. c.* 65.)

To the County Council.

THE PETITION of the [2] Parish Council, in the Rural [3] District of , in the county of .

Showeth :—

1. That there is a demand for allotments for the labouring population in the said parish of , in the said county, and that such allotments cannot be obtained at a reasonable rent or on reasonable conditions by voluntary arrangement between the owners of land suitable for such allotments and the applicants for the same.

2. That on the day of 19 , your petitioners,

[1] The six parliamentary electors [*or*, ratepayers, as the case may be] must sign here, adding their qualification.

[2] Substitute here, when necessary, "of the undersigned six registered parliamentary electors or ratepayers resident in the parish of , in the district of ."

[3] Substitute, when necessary, "urban."

as by law required, duly made a representation to the Rural[1] District Council of , to the following effect:—

That it was the duty of the said rural[1] district council to acquire land for allotments, and to let such land in allotments to persons belonging to the labouring population in the said parish of , and in support of the said representation your petitioners stated the following facts and particulars [*here state the facts and particulars as set out*].

3. That with the said facts and particulars before it, it was the duty of the said rural[1] district council to take proceedings under the Allotments Act, 1887, and that they have failed to acquire land in either sufficient quantity or of proper quality for the said required allotments.

YOUR PETITIONERS therefore request you, the said county council, to take such proceedings as may be necessary to put in force the provisions of the Allotments Act, 1887, for the purpose of providing the required allotments.

Dated this day of 19 .

Signed,[2] at a meeting of the said parish council held on the day of 19 , on behalf of the said council. } [*Chairman of the said meeting.*] [*Two Councillors present at the said meeting.*]

IV. *Form of Agreement for Letting an Allotment.*

AGREEMENT made this day of BETWEEN the (hereinafter called the council) of the one part, and of (hereinafter called the tenant) of the other part.

WHEREBY the said council agrees to let, and the said tenant agrees to hire, the allotment[s] numbered in the register of allotments provided for the of , and containing or thereabouts, at the yearly rent of , and at a proportionate rent of any period for less than a year over which the tenancy may extend, subject to the following conditions:—

(*a*) The rent shall be paid in each year.[3]

(*b*) Any member or officer of the council shall be entitled at any time when directed by the council to enter and inspect the allotment.

(*c*) The tenant shall be at liberty to [*here insert any provision as to building stable, barn, greenhouse, etc.*].

(*d*) The tenancy,[4] if not sooner terminated by the council in pursuance of the Allotments Act, 1887, or of any regulations made thereunder, shall

[1] Substitute, when necessary, "urban."

[2] If by electors or ratepayers, the signature here must follow that of Form I., *supra*.

[3] Insert here the days of the year on which portions of the rent are payable, bearing in mind that under the Allotments Act, 1887, s. 7 (1), not more than a quarter's rent shall be required to be paid in advance.

[4] See Act of 1887, s. 8 (2).

terminate on the death of the tenant, or after months' notice in writing given by the tenant, such notice to expire on the day of .

(*Signed*)

[*Clerk to the* .][1]

(*Witness*)

(*Signed*)

[*Tenant.*]

(*Witness*)

CONDITIONS OF TENANCY.

The tenant shall cultivate his allotment under the following conditions:—

1. He shall keep it free from weeds, well manured, and otherwise maintain it in a proper state of cultivation.

2. He shall not plant any trees or shrubs so as to be injurious to any adjacent allotment.

3. He shall keep every hedge that shall form part of the allotment properly cut and trimmed.

4. He shall not cause any nuisance or annoyance to the tenant of any other allotment.

[NOTE.—*The following forms relate to proceedings under the Allotments and Cottage Garden Compensation Act*, 1887 (50 & 51 *Vict. c.* 26).]

V. *Appointment of Arbitrator.*[2]

WE, A. B., clerk and agent of the council, on behalf of the said council and C. D., tenant of an allotment held from the said council, hereby appoint X. Y., of , as arbitrator, to determine all differences which have arisen between us with respect to the amount and time of payment of compensation due to be paid to the said C. D. by the said council on the determination of his said tenancy by the said C. D., in accordance with the provisions of the Allotments and Cottage Gardens Compensation for Crops Act, 1887.

Dated this day of , 19 .

(*Signed*) A. B.

[*Clerk and Agent of the said council on behalf of the said council.*]

(*Signed*) C. D.

[*Tenant.*]

VI. *Notice by Arbitrator to Parties to produce Documents, etc.*

In the Matter of an Arbitration between the Council and C. D. to Assess Compensation.

[1] If the letting is by a Parish Council, the agreement should be signed at a meeting of the Parish Council by the chairman and two councillors present.

[2] Under sec. 8 of the Act. Stamp, sixpence as for agreement.

To C. D.

[*or*, To A. B., Clerk of the Council, on behalf of the said council.]

TAKE NOTICE, that you are required to produce before me, the arbitrator herein, at in the noon on the day of 19 , at , all vouchers, books, papers and other documents relating to the matters in dispute in the said arbitration, which are now in your possession or power, or which you are able to produce, and particularly the following [*here describe particular documents required*].

Dated this day of 19 .

(*Signed*) X. Y.
[*Arbitrator.*]

VII. *Enlargement of Time for Award.*[1]

In the Matter of an Arbitration between the Council and C. D. to Assess Compensation.

WE, the undersigned, hereby agree that X. Y., the arbitrator appointed to settle the differences between us which were referred to him by a written appointment, dated the day of 19 , shall have until the day of 19 , for making his award respecting the said differences.

Dated this day of 19 .

(*Signed*)
[*Clerk to the said council, on behalf of the said council.*]

(*Signed*) C. D.
[*Tenant.*]

VIII. *Notice by Arbitrator to Proceed with Arbitration.*

In the Matter of an Arbitration between the Council and C. D. to Assess Compensation.

To C. D.

[*or*, To A. B., Clerk of the Council, on behalf of the said council.]

TAKE NOTICE, that I intend to proceed on the day of 19 , at o'clock in the noon, at , to determine the differences between the said council and the said C. D. which have been referred to me by them. If you, the said , fail to attend at the appointed time and place, I may proceed in your absence.

Dated this day of 19 .

(*Signed*) X. Y.
[*Arbitrator.*]

[1] Stamp, sixpence as for agreement. Under sec. 13 of 50 & 51 Vict. c. 26, the award is required to be ready in fourteen days from the date of appointment of the arbitrator, but the time may be extended up to an extra fourteen days, but not further.

IX. *Award of Compensation to an Outgoing Tenant.*

In the Matter of an Arbitration between the Council and C. D.

To all whom it may concern :—

WHEREAS the said Council and the said C. D. have failed to agree as to the amount and time of payment to which the said C. D. claims that he is entitled under the Allotments and Cottage Gardens Compensation for Crops Act, 1887, upon determination of his tenancy numbered on the Allotment List of the said council and situate , and previously held by him under the said council.

AND WHEREAS I, by an appointment bearing date the day of 19 , was duly appointed arbitrator by the said parties to determine their said differences.

[*Alternative:*

AND WHEREAS the said council and the said C. D., being unable to agree on the appointment of an arbitrator, made application on the day of 19 to the Justices of the Peace acting for the Petty Sessional Division of in the City of , in which the tenancy in question is situate, for the appointment of an arbitrator, and the said justices duly appointed me arbitrator to settle the said differences.]

[AND WHEREAS the time for making the said award has been extended by the said parties to the day of 19 .]

THEREFORE I, the said arbitrator, having taken upon myself the burden of the said reference, and having heard and examined the witnesses and duly considered the evidence produced before me with respect to the said differences, make and publish my award as follows :—

1. I award that the said C. D. is entitled to receive from the said council the sum of £ for [*detail here for what the compensation is payable*].

2. I find that there is due to the said council from the said C. D. the sum of £ in respect of [*rent, breaches of tenancy, agreement, etc.*], and I award that the sum of £ above awarded (in paragraph 1) to the said C. D. be reduced by the said sum of £ due by him to the council.

3. Finally, I award and determine that the net sum due to the said C. D. in respect of compensation, after deducting the said sum due by C. D. to the said council, is £ , and I direct that this last-mentioned sum shall be paid by the said council to the said C. D. on or before the day of 19 .

4. And I award that the costs of this arbitration and award shall be paid by the said council [*or*, as to the costs of this arbitration, each party shall pay his own costs, and as to the costs of this award bear a

half share each of the same], and that the said costs shall be paid on or before the day of 19 .

Witness my hand this day of 19 .

(*Signed*)

[*Arbitrator.*]

In the presence of

(*Signed*)

[*Witness.*]

[*Address.*]

[NOTE.—This award needs an impressed stamp: Not exceeding £5, threepence; exceeding £5 and not £10, sixpence; £10 and not £20, one shilling; £20 and not £30, one shilling and sixpence; £30 and not £40, two shillings; £40 and not £50, two shillings and sixpence; £50 and not £100, five shillings.]

Allowances.—See JUST ALLOWANCES.

Allowances (in regard to Estate Duty).—See DEATH DUTIES.

Alluvion.—In Roman law this term denotes the gradual and imperceptible increase which land bordering on a river or on the sea sometimes undergoes through the silting up of ooze, soil, sand, or other matter, or the permanent retiral of the water. Such latent increase was deemed to fall to the proprietor of the land to which it became attached. The principle has been incorporated into English law, and land so formed in England is held to accresce, even as against the Crown as lord of the foreshore (*q.v.*), to the owner of the adjacent soil. See ACCESSION; ACCRETION.

The leading case is *R.* v. *Lord Yarborough*, 1828, 5 Bing. 163; 27 R. R. 292, 305, where the word "imperceptible" was defined to mean not perceptible in its progress, though it might be capable of measurement after the lapse of a considerable time. If the formation is so rapid as to be instantly perceptible, as when the sea shrinks suddenly beyond the usual water-mark, we have DERELICTION (see DERELICT LANDS) and not alluvion, and in such a case there is no accretion unless the right to the increase has been granted by the king, as lord of the sea around the coast and of all land not in occupancy to subjects, or unless there is some properly established local or general custom regulating the disposal of such increase. So in *A.-G.* v. *Reeve*, 1884, 1 T. L. R. 675, where the deposit was visible from day to day, the Crown obtained judgment. See *Foster* v. *Wright*, 1878, L. R. 4 C. P. D. 438, and *Hindson* v. *Ashby*, [1896] 1 Ch. 78; [also *Ecroyd* v. *Coulthard*, [1897] 2 Ch. 554, 569; [1898] 2 Ch. 359.]

The Roman authorities base the principle on the *jus gentium*, and in this are followed by Bracton, lib. ii. c. 2. Others give as the reason for it that since an owner of land adjoining the sea has to bear losses arising therefrom, so he ought to be entitled to any gain similarly accruing, and that the king's prerogative does not extend to alluvion, because *de minimis non curat lex.*

In the case of artificial waters the principle may also apply, but each such case will be decided upon its own merits.

Alluvion (in International Law).—Used to denote the gradual deposit of matter, forming new land, by a river serving as a boundary between two States. Whether the channel remains common to the inhabitants of either bank, or whether each State possesses half of it, their respective rights are not in anywise changed by alluvion; and if the possession of the river be equally divided between the owners of the opposite banks, the mid-channel (see THALWEG), however the river may encroach on the one side and recede on the other, will continue to form the boundary.

[See Twiss, *Law of Nations in Time of Peace*, p. 251.]

Almanack.—A printed almanack was used to decide a disputed date at least as early as 11 Henry VII. (*Yearbook, f.s.*) (*Tulton* v. *Dawke*, 1860, 5 H. & N. 647). But the only almanack which the Courts will recognise is that annexed to the Book of Common Prayer; and this is not evidence of the time of sunrise or sunset on any particular day, or of the day of the week; only of the day of the month, of the number of days in the week, of the order of the months, and of such divisions of time as public fasts or feasts, and the commencement or ending of legal sittings. See MONTH; TIME, COMPUTATION OF.

Almoner.—An officer of the royal household whose function it is to distribute the royal alms. The Lord Almoner is now usually a bishop.

Alms.—Alms may be described as eleemosynary contributions for the poor. The ecclesiastical law enjoins the collection of alms for the poor by the deacons, churchwardens, or other fit persons during the reading of the offertory, which alms are to be brought to the priest after divine service, to be employed in such pious and charitable uses as the minister and churchwardens shall think fit, and, in case of their disagreement, by the ordinary.

By Canon 87 of 1603, the churchwardens are ordered to provide a strong chest with three keys (to be respectively kept by the incumbent and two churchwardens), and set it into the most convenient place, to the intent that the parishioners may put into it their alms for their poorer neighbours. The alms are to be taken out by the keepers of the keys quarterly, or as often as need be, and distributed, in the presence of most of the parish, or six of the chief of them, to their most poor and needy neighbours.

At common law, persons who had been obliged to depend in whole or part on eleemosynary assistance, have been held to be disqualified from exercising the franchise at common law, but this did not apply to a county voter continuing in possession of his freehold. In boroughs, the receipt of alms within a limited period was held to be a personal disqualification. Now, by 2 & 3 Will IV. c. 45, s. 36, the receipt of parochial relief or other alms is a disqualification for the parliamentary franchise (see *Cowen* v. *Kingston-on-Hull* (*Town Clerk of*), [1897] 1 Q. B. 273), and by the Municipal Corporations Act, 1882, s. 9, the receipt of union or parochial relief or other alms is a disqualification for the municipal franchise.

As to the meaning of "other alms" such as by the law of Parliament now disqualify, the following general rules may be stated:—

In many of the old boroughs the point has been determined by the usage of the place and the decisions of the House of Commons (Rogers on *Elections*, 16th ed., part i., pp. 208 *et seq.*).

In old boroughs where the usage was undetermined, and also in new boroughs where the usage was undetermined, it seems to have been held that those funds only disqualified which formed part of the general parish resources for the relief of the poor; but in *Harrison* v. *Carter*, 1876, 2 C. P. D. 26, it was held that alms, which by the law of Parliament disqualify, may include moneys distributed annually from the income of a private charitable bequest, and that the question what is such a receipt of alms as will constitute such a state of absolute indigence as to disqualify, must depend on the circumstances of the particular case.

See as to parliamentary disqualification, FRANCHISE (ELECTORAL).

[*Authorities.*—Steer, *Parish Law*, 4th ed.; Rogers on *Elections*, part i.; Phillimore, *Ecclesiastical Law*, vol. i. pp. 725, 726.]

Alms-house.—An alms-house is a charitable foundation for the poor generally, or for an indicated class of poor people. The statute 18 Eliz. c. 3, 1576, empowered persons "during the next twenty years to give land to erect hospitals and other abiding and working houses for the poor without licence of mortmain." The Act 39 Eliz. c. 5, dispensed with the special licence from the Crown in such cases. To these statutes the numerous charitable foundations of the kind which have since (particularly in the 16th and 17th centuries) sprung up in England and Wales, owe their origin. The relief of aged, impotent, and poor people is one of the charitable uses specified in 43 Eliz. c. 4. For this reason the law treats an alms-house, or a fund to be laid out in the foundation of alms-houses, as a charity (*In re White's Trusts*, 1886, 33 Ch. D. 449, 454).

The law as to alms-houses, therefore, is part of the general law as to charities (*q.v.*). The following points may, however, be mentioned:—

In *Chamberlayne* v. *Brockett*, 1872, L. R. 8 Ch. 206, it was held that a trust in a will for the erection of alms-houses when land should be purchased for the same as thereinafter mentioned, was a good charitable bequest, and an inquiry was directed as to whether any land had been rendered legally available for such purpose. In *Limbrey* v. *Gurr*, 1819, 6 Madd. 151; 56 E. R. 1049; 22 R. R. 262, a trust to hold alms-houses was held to fail when the amount required was not ascertainable. The nomination of the objects of such a charity belongs to the founder and his heirs, or those whom he shall appoint, in the absence of direction, express or implied, to the contrary (*A.-G.* v. *Rigby*, 1732, 3 P. Wms. 145; 24 E. R. 1005). When an alms-house is endowed out of a rent-charge arising out of manors and lands, the right of nomination belongs to the heir of the granter, and does not pass with the manor; but where the persons wrongly entitled had enjoyed the nomination for sixty years, the Court refused to disallow payments made by them to the poor (*A.-G.* v. *Rigby, supra*).

The founder of a charity for alms-houses, and his heirs, may forfeit the right of nomination by a "corrupt or improper nomination of such as are not fit objects of the charity, or by making no nomination at all; but this neglect of nomination must be after such time as the founder,

etc., have had notice of the vacancy, and without proof of such notice it is no fault" (*A.-G.* v. *Leigh*, 1721, 3 P. Wms. 146 (note); 24 E. R. 1005). Such right of nomination may be lawfully aliened (*A.-G.* v. *The Master, etc., of Brentwood School*, 1832, 3 Barn. & Adol. 59; 37 R. R. 326), and may be conferred by the founder on another person or body (*A.-G.* v. *Dean and Canons of Christ Church*, 1821, Jac. 474; 27 E. R. 929; 23 R. R. 126).

The management of alms-houses and their property are now subject to the provisions of the Charitable Trust Acts (see also Endowed Schools Acts, 1867, 32 & 33 Vict. c. 56, s. 24). [On this subject, see CHARITIES; CHARITY COMMISSION; TRUSTS.]

Alms-houses, in respect of public buildings, offices, and premises, are exempt from income tax (Property Tax Act, 1842, 5 & 6 Vict., c. 35, s. 6, sched. A). Land tax is not chargeable on any houses or land which, on or before the 23rd March 1693, belonged to the sites of [certain named institutions], or any other hospitals or alms-houses in England or Wales, in respect of rents or revenues payable to them before the 25th March 1693, and disbursed for the immediate use of such hospitals and alms-houses (35 Geo. 315, ss. 25, 26).

This provision applies even when land, formerly the site of an alms-house, is used for a different purpose (*Cox* v. *Rabbits*, 1878, 3 App. Cas. 473), but tenants holding lands or houses by lease or other grant from such alms-houses are not entitled to claim the exemption. Sec. 29 makes the lands and revenues of such hospitals or alms-houses as were assessed in the fourth year of the reign of William and Mary liable. See *Mary Clark Horne* (*Trs. of*) v. *Anderson*, [1904] 2 K. B. 645.

The inmates of an alms-house have the right to the electoral franchise when they are appointed for life, and have a freehold interest, legal or equitable, in the sums or houses held by them, although such occupation is in some sense eleemosynary (*Simpson* v. *Wilkinson*, 1844, 7 Man. & G. 50; 66 R. R. 667; *Roberts* v. *Percival*, 1864, 18 C. B. N. S. 36; but not where they are liable to be removed from room to room by the governors (*Freeman* v. *Gainsford*, 1861, 31 L. J. C. P. 33), or are removable at pleasure (*Davis* v. *Waddington*, 1844, 7 Man. & G. 37). See also ALMS; CHARITIES; FRANCHISE (ELECTORAL); HOSPITAL.

[*Authorities.*—Tudor on *Charitable Trusts*, 3rd ed.; Tyssen on *Charitable Bequests.*]

Alms-people.—See ALMS-HOUSE.

Alongside.—Charter-parties generally provide that the cargo is to be brought "alongside" the ship for loading, and taken from "alongside" at discharging, by the charterer. In the former case the cargo must be actually brought to the side of the ship, at the charterer's risk and expense, and if it is placed on the wharf near the ship, unless the shipowner indicates a place for it, the expense of getting it thence to the ship falls on the charterer (*Holman* v. *Dasnieres*, 1886, 2 T. L. R. 607). If the ship, owing to her draught, cannot be fully loaded at the quay, the expense of lightering the cargo to her is borne by the charterer (*Trindade* v. *Levy*, 1861, 2 F. & F. 441). Similarly, in discharging, the merchant must be ready to take delivery either on the quay, if the ship be lying at it, or in lighters at his own expense. The shipowner's responsibility for the cargo begins when it is delivered

to his servants alongside his ship (*Grant* v. *Coverdale*, 1884, 9 App. Cas. 475; see *Anderson* v. *Crondall*, 1898, 14 T. L. R. 256, for an example of a charter-party dealing expressly with the duties of shipper and shipowner in this respect), and ends when it is clear of the ship. And thus loss due to defective ship's tackle, as the goods are being taken out of the ship, falls on the shipowner (*Avon S.S. Co.* v. *Leask*, 1890, 18 Sc. Sess. Cas. 280). A charter-party providing for "cargo to be taken from alongside at merchant's risk and expense as customary," cannot be interpreted, by evidence of a custom, to mean that the shipowner shall bear this expense (*The Nifa*, [1892] P. 419, where the words "as customary" were in writing and the others in print): but a charter-party providing that "cargo was to be taken from alongside at merchant's risk" has been held to admit of a custom that the shipowner should put long lengths of timber into lighters brought alongside by consignees (*Aktieselkab Helios* v. *Ekman*, [1897] 2 Q. B. 83; 8 Asp. 244; and see *Northmoor S.S. Co.* v. *Harland & Wolff*, [1903] 2 Ir. R. 657). Where a charter-party provides for cargo "to be taken to or from alongside the ship at charterer's risk and expense," the charterer is bound to have the appliances for so doing ready, and is liable to the shipowner for any delay caused by default in this respect, unless the loading or discharge is to be "according to the custom of the port," and by that custom the landing and discharge must be liable to be delayed by circumstances, *e.g.* only one set of lighters being available for discharging in a bar harbour, and vessels having to wait their turn for them (*Wright* v. *New Zealand Shipping Co.*, 1878, 4 Ex. D. 165; *Postlethwaite* v. *Freeland*, 1879, 5 App. Cas. 599; *Stephens* v. *Wintringham*, 1898, 3 C. C. 169; *S.S. Isis Co.* v. *Bahr*, 1899, 3 C. C. 325; *S.S. Brenda* v. *Green*, [1900] 1 Q. B. 518; *Marwood* v. *Taylor*, 1900, 5 C. C. 343; 6 C. C. 178).

[Carver, *Carriage by Sea;* Scrutton, *Charter-Parties and Bills of Lading.*]

Altar; Altarage; Altar-cloth.—See COMMUNION.

Alternative Counts.—1. *In Civil Pleadings.*—Under the old common-law system of pleading, the declaration might join several causes of action in several counts, provided they were between the same parties and in the same rights, and framed in the same form of action: and so long as variances between the evidence and the record could not be amended at Nisi Prius, it was necessary to provide against the risk of variances by framing counts to cover every possible contingency which might arise on the evidence (Bullen and Leake, *Prec. Pl.*, 2nd ed., 6). This practice was modified under the Common Law Procedure Acts, and is now superseded as to the High Court, by the Judicature Acts and Rules (see R. S. C., 1883, Order 19, rr. 4, 24), under which alternative pleading is permissible, unless embarrassing; and inconsistency between the facts set up in different paragraphs of the claim or defence is not held embarrassing (*In re Morgan; Owen* v. *Morgan*, 1887, 35 Ch. D. 492).

2. *In Criminal Pleadings.*—In form, the counts of an indictment are never alternative, and it is a cardinal rule, in drawing an English indictment, not to use the word "or," or any word expressing an alternative, in any part of the indictment. In substance, alternative counts are permissible in an indictment where they do no more than

state the same offence in different ways, so as to cover the risk of any variance between pleading and proof which is not amendable. See AMENDMENT IN CRIMINAL PROCEEDINGS.

Where the indictment is for felony, it is essential, in practice, subject to certain statutory exceptions as to joinder, that the counts should be alternative in substance, *i.e.* should charge the same felony in different ways to meet the facts of the case, or should relate to one transaction, and not deal with different felonies (*Castro* v. *R.*, 1881, 6 App. Cas. 229, 244). Where two distinct felonies are charged in one indictment the practice is to make the prosecutor elect on which count he will proceed (Arch. Cr. Pl., 23rd ed., 88, 120; Bowen-Rowland's *Cr. Proc.*) Where it is for misdemeanor, as different misdemeanors may be joined in one indictment, this rule does not apply (*Castro* v. *R.*, 1881, 6 App. Cas. 229); but the practice is open to abuse and has been the subject of judicial comment (see *R.* v. *King*, [1896] 1 Q. B. 214); and where it is calculated to cause injustice to the accused, a separate trial of the different classes of charges can be ordered.

Alternative Limitations.—See EXECUTORY INTERESTS.

Alternative Pleading.—See ALTERNATIVE COUNTS.

Always Afloat.—Charter-parties often require that a ship shall discharge her cargo "always afloat;" this means that the port to which she is sent to discharge must be one in which she can lie safely with her full cargo and discharge it without touching the ground; and even where these words are not inserted, they are probably implied in the case of large vessels and steam or iron ships. The charterer cannot, by offering to lighten her, compel her master to take her to a port where there would not be enough water for her with a full cargo on board, if the charter-party says that she is to go to "a safe port, or as near thereto as she can safely get and always lay and discharge afloat" (*The Alhambra*, 1881, 6 P. D. 68). But if a special port is named in the charter-party, or agreed to by the parties, and the ship is to go there and "lie afloat at all times of tide," and the charterer offers to lighten the ship to a reasonable extent, so that she may be able to get to the port, though she cannot do so with a full cargo, the master is not justified in refusing (*Hillstrom* v. *Gibson*, 1870, 22 L. T. 248). The words are not construed any more in favour of the shipowner than of the charterer. Thus where the ship was chartered to "proceed to the charterer's loading berth, North Dock, Swansea, and there load always afloat a full and complete cargo; lighterage, if any, necessary to enable steamer to complete loading at North Dock, Swansea, to be at merchant's risk and expense;" and when the ship arrived at the dock, the tides were "taking off," and although she could have been fully loaded, lying afloat in the dock, she would not have been able to get over the sill of the dock except by waiting a week; and the master accordingly moved her out of the dock before all the cargo was loaded, and finished loading in another dock; it was held that the shipowners must pay the cost of bringing the goods from one dock to the other, as the mere fear of detention of the ship was no excuse for moving her (*The Curfew*, [1891] P. 132). Where it is impossible to discharge at the port named always afloat, the master is justified in discharging at the nearest port

where the ship can lie afloat (*Treglie* v. *Smith's Timber Co.*, 1896, 12 T. L. R. 363). For what is a "safe port," see *Fraser* v. *Bee* (1901, 49 W. R. 336); "a safe port in United Kingdom," see *Goodbody* v. *Balfour* (1899, 4 C. C. 119); and for similar expressions see *Macbeth* v. *Wild* (1900, 16 T. L. R. 497); *Sailing Ship Milverton Co.* v. *Cape Town, etc., Co.* (1897, 2 C. C. 281); *Weir* v. *Richardson* (1897, 3 C. C. 20).

The clause may be made more stringent by adding words, such as "at all times of tide" to "always afloat": a ship chartered to "go to Sharpness, or so near thereto as she could safely get *at all times of tide, and always afloat,*" was held to have arrived at her destination on getting to an open roadstead in the Severn, which was the nearest place to Sharpness which she could reach in the then condition of tide, and the lay days began to run (*Horsely* v. *Price*, 1883, 11 Q. B. D. 244).

In the same way, a ship chartered to go to Liverpool, "to discharge in a dock as ordered, on arriving, *if sufficient water*, or so near thereunto as she may safely get, *always afloat*, was held not to be bound to go, when ordered by the charterer, to a dock which she could not enter when she arrived, owing to want of water (*Allen* v. *Coltart*, 1883, 11 Q. B. D. 782). Where a ship was to load always afloat as and where ordered by charterers, the charterers were held not bound to order the ship to a berth where she could *at that time* load continuously always afloat, and not liable for delay caused by physical causes beyond their control and known to both parties (*Carlton S.S. Co.* v. *Castle Mail Packets Co.*, [1898] A. C. 486). See *Aktieselskabet Inglewood* v. *Millar's Karri and Jarrah Forests*, 8 C. C. 196.

[Carver, *Carriage by Sea*, 4th ed., 1905, ss. 449, 450, 455, 457; Scrutton, *Charter-Parties and Bills of Lading*, 5th ed., 1904, art. 37.]

Amalgamation.—See COMPANY.

Ambassador (according to Murray's *New English Dictionary*, from the medieval Latin *ambactiator*, agent, noun, from *ambactiare*, to go on a mission; according to Wicquefort, from the Spanish word *embiar*, to send).—The highest rank of public minister accredited to a foreign Court. Other public ministers—envoys extraordinary, MINISTERS PLENIPOTENTIARY (see PLENIPOTENTIARY) and CHARGES D'AFFAIRES (*q.v.*) —occupy lower positions in the diplomatic hierarchy.

The ambassador's papers, his credentials or letters of credence (see DIPLOMATIC AGENTS), are signed and addressed direct by his sovereign, of whom he is the immediate representative, to the foreign sovereign to whom he is accredited, and with whom he has the privilege of personal communication. Simple ministers and *chargés d'affaires* have not this privilege as a right; and the latter are supposed to act as mere agents between Governments, and not to be admitted to personal intercourse with the sovereign at all.

In current practice, however, the distinction only affects matters of precedence. Thus in British ceremonies the ambassador enjoys rank immediately after the royal family, whereas that of ministers plenipotentiary is after dukes and before the marquises. The origin of this latter ceremonial status seems unknown.

The sovereign has a constitutional right of veto in the appointment of ambassadors, which is supposed, however, to be rarely exercised.

Still it was so, in 1835, by William IV., who declined to sign the appointment of Lord Durham to the embassy at St. Petersburg.

The sovereign has also the right to refuse to receive as ambassador the person accredited to him.

See DIPLOMATIC AGENTS for the origin, the privileges, and immunities of ambassadors and their suites and servants.

Ambiguity.—*Double meaning* (*Johnson's Dictionary*, by Todd).

There are two sorts of ambiguity, the one "patent" and the other "latent." A "patent ambiguity" is one which is apparent on the face of the instrument. A "latent ambiguity," also called an equivocation, is one not apparent on the face of the instrument, but raised by the introduction of extrinsic evidence.

Examples of Patent Ambiguity.—"I give my horse to my nephew John or William." "I devise Whiteacre to one of the sons of J. S."—J. S. having several sons (*Strode* v. *Russel*, 1708, 2 Vern. 621, at p. 624; 23 E. R. 1010).

Examples of Latent Ambiguity.—(1) A grant of the manor of S. to J. F. and his heirs, the grantor having two manors of S. (2) A bequest "to my cousin T. S.," the testator having two cousins of that name.

Ambiguity must be distinguished from inaccuracy. "Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one leasehold house in a given place, and no other house, were to devise his freehold house there to A. B., the description, though inaccurate, would occasion no ambiguity." That is to say, there would not be two subjects to which the description in the will was equally applicable (Wigram on *Interpretation of Wills*, 4th ed., p. 178).

That parol evidence is admissible to explain a latent, but not a patent, ambiguity is a trite saying, but not an exact one. Parol or extrinsic evidence may be either simply *explanatory of the words*, or *evidence to prove intention*. Explanatory evidence may be and frequently is resorted to in the case of patent ambiguity. Thus, as to wills, the Court has a right to ascertain by extrinsic evidence all the facts known to the testator when he made his will, and thus to place itself in the testator's position in order to ascertain the bearing of the language which he uses, and whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied (*Charter* v. *Charter*, 1874, L. R. 7 H. L. 377; [*In re Grainger; Dawson* v. *Higgins*, [1900] 2 Ch. 756]). But *evidence to prove intention* is not admissible in the case of a patent ambiguity, though it is in the case of a latent ambiguity. *Fleming* v. *Fleming*, 1862, 1 H. & C. 242, is an example of the kind of evidence admissible to explain a latent ambiguity. There the testator bequeathed to his son Edward Fleming a dwelling-house in the occupation of his son John during his life, and at his death to descend to testator's grandson, Henry Fleming, and his heirs. The testator had two grandsons named Henry, the claimant, who was the son of testator's son Edward, and the defendant, who was the son of testator's son John. The following parol evidence was admitted, namely, that the defendant (who ultimately succeeded in the action) from his childhood had resided with the testator, and that he had been frequently heard to say that he should

give him the house in question, and also that the testator was not aware that Edward had any son. [In *In re Fish; Ingham* v. *Rayner*, [1894] 2 Ch. 83, however, extrinsic evidence was held inadmissible to determine to which of two nieces of the same name the testator intended to make a gift, one being legitimate and the other illegitimate.]

Bacon's *Maxims*, reg. 23, p. 90, form the basis of the law on this subject.

The following is an extract therefrom:—"*Ambiguitas patens* is never holpen by averment, and the reason is because the law will not couple and mingle matter of specialty, which is of higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averment, and so, in effect, that to pass without deed which the law appointeth shall not pass but by deed.

"But if it be *ambiguitas latens*, then otherwise it is: 'As if I grant my manor of S. to J. F., and his heirs,' here appeareth no ambiguity at all; but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact, and therefore it shall be holpen by averment, whether of them was that the party intended should pass.

"So, if I set forth my land by quantity, then it shall be supplied by election and not averment.

"As if I grant ten acres of wood in sale, where I have an hundred acres, whether I say it in my deed or no that I grant out of my hundred acres, yet here shall be an election in the grantee which ten he will take."

"Averment" was an old pleading term, meaning to vouch or verify, but the rule has become applicable to evidence generally.

Tapley v. *Eagleton*, 1879, 12 Ch. D. 683, is an example of a latent ambiguity being determined by election. There the testator, being possessed of three leasehold houses in King Street, bequeathed "two houses in King Street" in trust for P. for life, and then to form part of testator's residuary estate. It was held that P. was entitled to elect which two houses in King Street he would take. The case is distinguishable from *Asten* v. *Asten*, [1894] 3 Ch. 260, where it was apparent on the face of the will that the testator intended to give a particular house to each son, but, owing to the houses not being numbered at the date of the will, it was impossible to say which house the testator intended to give to any of the sons. [See also *In re Cheadle; Bishop* v. *Holt*, [1900] 2 Ch. 620.]

Closely allied to this subject is the maxim, "*Falsa demonstratio non nocet.*"

Thus, if a legatee is misdescribed in a will, the legacy is not inoperative, provided, after rejecting so much as is false, the remainder will enable the Court to ascertain with legal certainty the identity of the legatee (see *Ford* v. *Batley*, 1853, 23 L. J. N. S. Ch. 225).

If a blank is left for the name of a legatee, parol evidence is not admissible to supply it (*Baylis* v. *A.-G.*, 1741, 2 Atk. 239; 26 E. R. 548; *In re Harrison; Turner* v. *Hellard*, 1885, 30 Ch. D. 390, seems to have turned on the context). [But although a complete blank in a will cannot be filled up, a partial blank, *e.g.* "my granddaughter ——," may be explained by extrinsic evidence (*In the Estate of Hubbuck*, [1905] P. 129). In construing a will containing an ambiguity, the Court may, for the purpose of explanation, refer to a recital in a codicil, unless it be obviously erroneous (*In re Venn; Lindon* v. *Ingram*, [1904] 2 Ch. 52).]

Another maxim bearing on this subject is, "*Veritas nominis tollit errorem demonstrationis*" (Broom's *Legal Maxims*, 7th ed., p. 478). Thus, if a testator devises land to William, the eldest son of the testator's nephew, and the nephew had two sons, John the elder, and William the younger, other things being equal, the name will prevail, and William will take (see *Garland* v. *Beverley*, 1878, 9 Ch. D. 213). This maxim only applies if it is clear that the error is in the demonstration. Therefore, either the name or the description will prevail according as it is reasonably certain that the mistake is more likely to be made in the name than in the description, or *vice versâ* (Theobald on *Wills*, p. 263, 6th ed.).

If the description of the person or thing be partly applicable to one object or subject and partly to another, and no case of equivocation arises, parol evidence is not admissible. Thus, in *Doe* v. *Hiscocks*, 1839, 5 Mee. & W. 363, testator devised lands to his son John H., for life, and from his decease to testator's grandson John H., eldest son of John H., for life, and on his decease to the first son of the body of his said grandson John H., in tail male, with remainders over. At the date of will, testator's son John H. had been twice married; by his first wife he had one son, Simon; by his second wife an eldest son, John, and other younger children, sons and daughters. Held that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will.

[See further, Bacon's *Maxims*, reg. 23; Wigram on the *Interpretation of Wills*, 3rd and 4th eds.; and Norton on *Deeds*.]

Amendment in Civil Proceedings.—*Pleadings.*—In the High Court a party has generally little difficulty in obtaining leave to amend his own pleadings, provided his application is not left to so late a stage of the proceedings that to allow an amendment then would be unjust to his opponent. "Whenever a statement of claim is delivered, the plaintiff may therein alter, modify, or extend his claim without any amendment of the indorsement of the writ (Order 20, r. 4). And "the plaintiff may without any leave amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared, or where defence is delivered but no order for reply is made, within ten days from delivery of the defence or the last of the defences" (Order 28, r. 2, as amended by R. S. C., July 1905). But Order 20, r. 4, applies only to cases where the plaintiff has delivered a statement of claim separate from the writ. And though he may by amendment in pursuance of order extend or amplify the claim on the writ, he may not introduce a new and different cause of action (*Cave* v. *Crew*, 1893, 62 L. J. Ch. 530). Nor, if in his statement of claim he intentionally drops one of the causes of action mentioned in the writ, will he be readily granted an order to amend his statement of claim by restoring the cause of action dropped (*Cargill* v. *Bower*, 1878, 10 Ch. D., at p. 508).

And Order 28, r. 2, applies only to the plaintiff's claim, whether embodied in a separate statement of claim, or in a special indorsement on the writ. It does not give the right, in either case, to add

new parties, or to amend any portion of a writ except the special indorsement.

For such amendments leave is necessary, which can be granted in a proper case, under Order 16, r. 11, or Order 17, rr. 2 and 4, or Order 28, r. 1. If the writ be specially indorsed, the plaintiff can amend the indorsement once without leave, under Order 28, r. 2, even while a summons for judgment under Order 14 is pending; and no fresh summons is necessary (*Roberts* v. *Plant*, [1895] 1 Q. B. 597). A defendant, too, may amend a counter-claim or set-off (but not his defence) without any leave, provided he does so before the expiration of the time allowed for answering the reply and before such answer, or, in case there be no reply, then at any time before the expiration of twenty-eight days from defence (Order 28, r. 3). To amend his defence he must always obtain leave. In all these cases, the party amending must pay all costs occasioned by the amendment, unless the master shall otherwise order (Order 28, r. 13).

But very different considerations apply when a party desires to have his opponent's pleading amended. It is true that, under rule 27 of Order 19, a master at chambers has power to order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action. And he has further powers under Order 25, r. 4. But it is not easy to obtain an order under these rules. One party has no right to dictate to the other how he shall plead. "Nothing can be scandalous which is relevant" (*per* Cotton, L.J., in *Fisher* v. *Owen*, 1878, 8 Ch. D., at p. 653). The mere fact that an allegation is unnecessary is no ground for striking it out; nor is a pleading embarrassing merely because it contains allegations which are inconsistent or stated in the alternative (*Re Morgan*, 1887, 35 Ch. D. 492). Unless the pleading as it stands is really and seriously embarrassing, it is often better policy to leave it unamended; the applicant only strengthens his opponent's position by reforming and improving his pleading.

Writ of Summons, and other Proceedings.—The High Court has a general power to amend any proceedings which do not comply with its rules or practice (Order 70, r. 1). An irregular proceeding is not to be treated as void, but may be either set aside for irregularity, or amended, or otherwise dealt with as the Court may think fit (*Petty* v. *Daniel*, 1886, 34 Ch. D., at p. 180). It is a somewhat strange omission from the Judicature Acts and rules that no definite power is given to amend any proceedings wherever justice requires. Order 28, referred to above (*Pleadings*), applies only to pleadings, and Order 70, r. 1, refers only to the removal of any irregularity in proceedings. The High Court in practice exercises a far wider power, as wide even as that which is imposed as a duty on the judges of County Courts. Sec. 87 of the County Courts Act, 1888, is as follows:—"The judge (County Court) may at all times amend all defects and errors in any proceeding in the Court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as the judge may think just; and all such amendments as may be necessary for the purpose of determining the real question in controversy between the parties shall be so made, if duly applied for." This does not empower a County Court judge to amend particulars by adding or

substituting a new cause of action not within his jurisdiction to deal with (*Hopper* v. *Warburton*, 1863, 32 L. J. Q. B. 104).

A writ of summons, or originating summons, may be amended before service without order on payment of the fee (2s. 6d.), by leave of a master, or of the chief clerk of the Writ, etc., Department, Central Office, on the certificate of the solicitor that it has not been served on any defendant or respondent. This does not affect the right of a plaintiff to amend the special indorsement on a writ once before reply without order or fee, as stated in *Pleadings, supra.*

After a service on any defendant or respondent, neither a writ of summons nor originating summons can be amended except in pursuance of an order obtained on summons.

An appearance may by leave be amended by consent of the plaintiff on payment of the fee (2s.), and on filing the consent. Leave may be obtained on production of the *præcipe* for amendment, and the consent, to a master; but leave is not thus given, as a rule, where such amendment involves any change in the position of the parties, as, for example, where the object of the amendment is to withdraw an appearance properly entered for a defendant so as to place him in default.

In divorce proceedings, pleadings (including the petition) may be amended by order obtained on motion, or summons (Rules and Regulations (Divorce), 1865, rr. 34, 187. But leave will not be given to amend a petition by importing a fresh cause of action which did not exist when the suit was commenced (*Lapington* v. *Lapington*, 1888, 14 P. D. 21).

Amendment in Criminal Proceedings.—*On Indictment.*—1. Criminal proceedings on indictment did not fall within any of the old statutes of *jeofails* authorising the Court to amend. The indictment, being theoretically the work of the grand jury, was not amendable by the Court, but was occasionally amended by the grand jury, if a defect was discovered before their discharge (Hawk., P. C., bk. ii. c. 25, ss. 97, 98). 2. Power is given by statute to amend indictments before verdict—(*a*) Where a plea in abatement for misnomer, etc., is proved (7 Geo. IV. c. 64, s. 19); see ABATEMENT. (*b*) Where a formal defect is apparent on the face of the indictment (14 & 15 Vict. c. 100, s. 25). (*c*) Where there is a variance between the indictment and the evidence, not calculated to prejudice the defence on the merits (11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, ss. 1-3; *R.* v. *Murray*, 1906, 22 T. L. R. 596; Arch. Cr. Pl., 23rd ed., 52, 296); and see VARIANCES. 3. Where a plea is on demurrer held to be bad or defective, there is no power to order amendment; but in treason or felony the defendant, in the interests of clemency, is entitled to put in a fresh plea (see *R.* v. *Duffy*, 7 St. Tri. N. S. 795). In misdemeanor the Court may, in its discretion, either enter judgment for the Crown, or give leave to plead over (see Arch. Cr. Pl., 23rd ed., 167). 4. Judgments may be amended until the conclusion of the assizes or sessions of the Court.

Summary Proceeding.—In proceedings before justices, whether at a preliminary inquiry or in proceedings for a summary conviction or order, variances between information, summons or warrant, and the evidence given are not dealt with by amendment, but if they are of such a character as to mislead the defence, the justices can deal with the matter by adjournment (11 & 12 Vict. c. 42, ss. 8, 9; 11 & 12 Vict. c. 43, s. 1).

Convictions and orders may be amended or corrected until lodged with the clerk of the peace or acted upon (see *Ex parte Kenyon*, 1881, 45 J. P. 303; *Ex parte Austen*, 1880, 50 L. J. M. C. 9; Saunders' *Mag. Practice*, 6th ed., 167-170; Stone's *Justices' Manual*, 38th ed.).

In the case of appeals to Quarter Sessions from the orders or convictions by justices in Petty Sessions, etc., or in the case of a *certiorari* issuing out of the High Court to bring up such convictions or orders, the Appellate Court may amend the conviction or order in cases of omission or mistake (12 & 13 Vict. c. 45, s. 7), but not in cases of substantial defects (*R.* v. *Padbury*, 1879, 5 Q. B. D. 126).

Where a special case is stated, either under the Crown Cases Act, 1848, 11 & 12 Vict. c. 78, or by justices under 20 & 21 Vict. c. 43, or the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 33, the High Court may send it back for amendment if the statement is defective (11 & 12 Vict. c. 78, s. 4; 20 & 21 Vict. c. 43, s. 7; 42 & 43 Vict. c. 49, s. 33).

Amends, Tender of.—The Public Authorities Protection Act, 1893, allows the defence of tender of amends before action in any action for damages against any person (or persons or body of persons, corporate or unincorporate), for any act done in pursuance (see PURSUANCE) or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority (56 & 57 Vict. c. 61, s. 1). See further, PUBLIC AUTHORITIES PROTECTION ACT.

In actions of trespass, *qu. cl. fr.*, the defendant may plead a disclaimer of title, and that the trespass was by negligence or involuntary, and tender of sufficient amends before action brought, as a bar to the action (21 Jac I. c. 16, s. 5).

In an action of replevin, to an avowry for damage fesant, the plaintiff may lead a tender of amends, either before distress, which makes the taking unlawful, or before impounding, which makes the detention unlawful (*Six Carpenters' Case*, 1611, 8 Rep. 147*a*; *Green* v. *Duckett*, 1883, 11 Q. B. D. 275).

To an action for irregular distress, it is a good defence that tender of amends has been made before action brought (11 Geo. II. c. 19, s. 20).

No actions can be brought for irregularities and wrongs committed in the execution of the Metropolitan Police Courts Act, 1839, if tender of sufficient amends has been made before action brought (2 & 3 Vict. c. 71, s. 52).

A mensa et thoro.—See JUDICIAL SEPARATION.

Amerciaments.—A pecuniary penalty assessed by the peers or equals of the person punished. The entry on the roll of the Court imposing the amerciament was thus *Ideo est in misericordia*, and the word *misericordia*, or a contracted form of it, was written in the margin. Afterwards the amerciament, if in the Court of a county, hundred, or manor, was assessed by the AFFEERORS (*q.v.*); but in the superior Courts the practice was for the clerk of the warrants to make estreats of the amerciaments, and to deliver them to the clerk of assize, who in turn delivered them to the coroners to affeer (*La Novvelle Natura Brevium*, ed. 1581, p. 76*a*). But an amerciament upon a sheriff or any officer or minister of the Courts was affeered by the judges (4 Co. Rep. Ed. 1826,

p. 221); and was called an Amerciament Royal. In many cases, however, amerciaments were fixed by custom, and not affeered; thus, in most hundreds and manors, breaches of the Assize of Ale were punished by a fixed amerciament of fourpence or sixpence. But except where there was a custom to amerce without affeerment, a person whose amerciament had not been affeered could have by way of remedy a writ under c. 20 of *Mag. Cart.* in the form given in *La Novvelle Natura Brevium* (p. 76*b*). Counties, hundreds, and towns were frequently amerced for various offences, and the affeerment was made by the coroners in the same manner as were other amerciaments imposed by the superior Courts. It was considered that, as coroners were knights elected in full County Court, an affeerment made by them was a sufficient compliance with the Stat. Westm. ii. c. 18. When an amerciament had been assessed by the affeerors of the Court of a manor or hundred, the lord could distrain for it or sue for it as a debt.

[See Pollock and Maitland, *History of English Law*, vol. ii. p. 512; *Griesley's Case* (Co. Rep. Ed. 1826, p. 221; *De Moderata Misericordia.*]

American Law.—The source of American law is the common law of England. When the governments of the several American colonies on the Atlantic coast became, in 1775 and 1776 or thereabouts, independent of the mother country, they each adopted the common law of England, as it then existed and had theretofore been administered from the foundation of the colonies by the colonial Courts, as the common law of the land. Thus, for example, New York adopted the common law as it existed on the 19th day of April 1775—the date of the battle of Bunker Hill—as the law of the State. All English statutes and decisions in force on that day are therefore now a part of the common law of New York, except so far as they may have been repealed, modified, changed or over-ruled by subsequent legislation or judicial decision in that State. Each of the original States of the Federal Union did substantially the same thing, and equally in the States admitted to the Union since the formation of the present national government, the common law prevails by similar action of the people, except in the case of Louisiana, where the Code Napoleon is the fundamental law. Many of the great English statutes, like the Statutes of Frauds, of Limitations, of Wills, of Charitable Uses and Trusts, and the like, have been substantially re-enacted in the various States. Each one, therefore, of the forty or more independent commonwealths which now compose the Federal Union, excepting only the State of Louisiana, has a common law of the land based substantially upon the common law of England. And with differences, for the most part immaterial, and surprisingly slight and insignificant, in consideration of the lapse of more than a century, and the free development of the law along independent lines in nearly half a hundred distinct and separate jurisdictions beyond the sea, it may be said, speaking not too broadly, that the common law of England, as now administered here, is equally the common law to-day of all the American commonwealths, excepting Louisiana. Law students in America accordingly study at the outset Blackstone's *Commentaries*, and are set to read the English Statutes and Law Reports. American judges regard with favour the citation of English cases in point, *arguendo* and by way of illustration, and American Reports and text-books contain constant references to them.

In contradistinction to the common law of the several States, above referred to, there is growing up in the Federal Courts a common law of the United States, based equally upon the common law of England and of the several States. It is for the most part of recent development, and has been occasionally criticised, not unnaturally with some severity, in the State Courts. The Federal Courts have a jurisdiction prescribed by the Constitution of the United States, which is in some sort superimposed upon the jurisdiction of the State Courts, sometimes conflicting, sometimes concurrent in a particular State with that of the State tribunals, and at other times exclusive and independent, but in every case defined and limited by the Federal Constitution. In these Courts, both in civil and criminal matters, there has come to be recognised, along certain lines, a common law of the United States, which is certain to assert and reassert itself more and more as the federal jurisdiction grows and develops, particularly in cases involving the law merchant, the law of commercial paper, and the like. Thus, for example, in the case *In re Neagle*, 1889, 135 U. S. 69, it was held that there is a peace of the United States, as distinguished from the peace of the individual State, a breach whereof is possible within the territorial limits of the State, as by an assault upon a federal officer or judge.

The practice of citing American decisions in the English Courts, *arguendo*, has been condemned by the Court of Appeal (unreported case, 1889, 33 Sol. J. 419). These decisions are worthy of all respect as expressing the opinions of very learned lawyers on analogous questions, but they cannot be quoted as decisions binding our Courts on questions of English law. In *Steel* v. *Dixon*, 1881, 17 Ch. D., Fry, J., at p. 831, observed that, in coming to the conclusion he did on principle, he was much strengthened by the American authorities, to which his attention had been called. [See also *Scaramanga* v. *Stamp*, *per* Cockburn, C.J., 1880, 5 C. P. D. 303; *In re Missouri S.S. Co.*, 1889, 42 Ch. D. 330; *The Bernina*, 1887, 12 P. D. 77; *Dulieu* v. *White*, [1901] 2 K. B. 669; *Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 260.]

Inasmuch as there are American cases and American cases, and because many American decisions are regarded as of no consequence in the United States, the value to English counsel, and the availability for citation in argument of any particular American case, must depend very much upon the Court by which, sometimes upon the time at which, and sometimes upon the judge by whom, it was decided. The relative standing of the various Courts varies essentially, and the strength of a particular Court may vary from time to time. A judge of exceptional ability sometimes adorns and dignifies a bench otherwise mediocre and commonplace in character; for example, Judges Cooley and Campbell, on the Supreme Court of Michigan; Judge Valentine, on the Supreme Court of Kansas; Judge Dillon, on the Supreme Court of Iowa; or Judge Greene, on the Supreme Court of Appeals of West Virginia. Some Courts are always of commanding influence and authority, some almost always the reverse. Without definite information upon these points, it will be difficult for English counsel rightly to estimate the value of American cases. The decisions of the Supreme Court of the United States are always cited in America as of exceptional value *arguendo*, even in cases in the State Courts where they are not of binding force and authority. The judges of that Court are appointed by the President, and hold their office for life. They are usually men

of first-rate judicial capacity and character. The opinions of Chief-Justice Marshall, Chief-Justice Taney, and of Justices Miller, Bradley and Story, are perhaps pre-eminent. Some of the judges of the Circuit Courts of the United States whose opinions are reported, speak with the utmost authority, for example, Judge (afterwards Justice) Blatchford in patent cases (Blatchford's *Reports*), and Judge Dillon (Dillon's *Reports*). The *Federal Reporter* and the *Reports of Decisions in the United States Circuit Courts of Appeal* are generally cited with respect in America. Among the State Courts the decisions of the Court of Appeals of New York and the Supreme Judicial Court of Massachusetts have perhaps the greatest currency and authority in the other States. The decisions of Chief-Justices Shaw and Parsons in Massachusetts are entitled to much weight, and the present Court is unquestionably the ablest State Court in America. *The New Jersey Law Reports* and the *New Jersey Equity Reports* are exceptionally valuable. The *Pennsylvania Reports* are of unequal merit. Among the older judges in that State, Sharswood, Black, Woodward and Paxson were conspicuous. The Supreme Court of Louisiana is cited with respect, especially upon commercial questions. The Supreme Court of Appeals of Virginia (Grattan's *Reports*), of South Carolina and of Arkansas, prior to the Civil War (1861-1865), were learned and able Courts. The decisions of the Supreme Courts of California and Colorado, especially in cases involving mining law, are regarded as valuable, so also those of the Court of Appeals of Kentucky in cases involving the title to land. The decisions of the Supreme Courts of Maine, Connecticut and Wisconsin are usually of very respectable authority. Less can be said, speaking generally, of the decisions of the Supreme Courts of Vermont, New Hampshire, Georgia, Tennessee, Ohio, Missouri, Indiana and Texas. In these States the decisions of the Court of last resort are, perhaps, of less average merit than in the other States mentioned above. They are certainly of less commanding influence. The careful English barrister will judge of the value of a particular decision, or of a series of reports, somewhat as he finds it or them cited by the Supreme Courts of the United States, in cases arising out of the particular jurisdiction, or by such State Courts as those of New York, Massachusetts, or New Jersey, or by the most approved American text-writers.

The various series of selected American cases are also to be recommended as aids to English counsel in looking up leading American cases on any particular questions. The American *Decisions* (100 vols.) contain a careful selection of leading cases from all the States, for the first one hundred years of American jurisprudence down to about the year 1869. The American *Reports* (60 vols.) continue this selection of cases down to about the year 1888. The editorial work on this series was done by Mr. Irving Browne, the American editor of *English Ruling Cases.* The American *State Reports* (104 vols., to January 1906) is the current series, carrying the work down to the present time, following close behind the official series of reports in each State. The cases included in these special series of reports are presumedly the best to be found in the reports of each State. They are judiciously annotated, and, taken together, give a good general view of what is best and most valuable in American case law. They include, however, no Federal cases, for which the reader must look to the official reports themselves.

In the United States Digest (old and new series) all the cases of

any value, both State and Federal, from the foundation of the Courts down to the year 1887, are accurately digested. The American Digest (annual from 1887 to the present time) contains reference to *all* current cases decided in Courts of last resort. The *General Digest* (now in course of publication) consolidates both the above-mentioned Digests in one series, and under one alphabetical arrangement, which will make all American case law of easy access to English counsel.

American Securities.—Bonds are the favourite form of securities in the United States, whether issued in connection with Government or State loans or loans to companies. As regards the negotiability of foreign bonds payable to bearer, according to English law, *London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201, is of some importance as being a decision of the House of Lords recognising that the quality of negotiability may exist. Judges of first instance have since pronounced decisions on the subject of the negotiability of securities, viz., Kennedy, J., in *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658 (where the securities were debentures payable to bearer, issued by an English company), and Bigham, J., in *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144. The lastly-cited case related to debenture bonds payable to bearer, some of which were issued by an English company, and the rest by foreign companies abroad, and the learned judge, in deciding in favour of negotiability, said: "In my opinion, the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved and its convenience is so obvious that it must be taken now to be part of the law; the very expression 'bearer bond' connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities."

Government Securities.—The United States Government Four per Cent. Funded Loan of 1877 was issued under Acts of Congress for the refunding of the national debt. The actual issue was for nearly $741,000,000, but a number of the bonds have been bought in by the Treasury and cancelled. Some of them are registered; a smaller number being unregistered or coupon bonds. Bonds to bearer or registered bearer bonds can be exchanged for registered certificates, but reconversion is not allowed. The bonds are redeemable at the pleasure of the Government after July 1, 1907.

The United States Government Four per Cent. Loan was issued under an Act of Congress of 1875 and other Acts. It is secured by bearer bonds and by registered bonds of $1000 and $5000 each—redeemable at Government pleasure after February 1, 1925. Over $62,000,000 were issued in 1895, and $100,000,000 were issued in 1896. The United States Government Three per Cent. Loan was issued, to the extent of nearly $200,000,000, in 1898, under an Act of Congress of the same year, but a large amount has apparently been redeemed. The loan is secured by bearer bonds, but bonds may be registered. The loan is redeemable at the option of the Government after 1908, and is repayable on August 1, 1918.

The United States Government Two per Cent. Thirty Year Bonds were issued in pursuance of an Act of Congress of 1900, in exchange for securities bearing a higher rate of interest. These bonds—some regis-

tered, some coupon—are redeemable at Government's option after April 1, 1930.

Besides the above there were outstanding at the end of 1904 a number of Four per Cent. Refunding Certificates, authorised by an Act of 1879. Some, at any rate, of the States have also raised loans on bonds and other securities.

[Want of space prevents us from detailing the numerous securities issued by the Governments of countries in South America, many of which are now greatly improving in value.]

Railway Securities.—These rank substantially in the order in which they are described below :—

1. *Receivers' Certificates*, issued by receivers in cases of emergency only, and to keep the property together. They can only be issued under the express order of the Court, which directs them to be paid before the bond-holders are paid any part of their debt. The English Courts have power to authorise a receiver to give a charge in priority to the debentures (*Greenwood* v. *Algesiras Co.*, [1894] 2 Ch. 205).

2. *Prior Lien Bonds*, generally issued to pay debts which have priority over the funded debt, and taken up by the holders of existing bonds, who must consent to their having precedence over existing bonds.

3. *Mortgage Bonds.*—These are equivalent to what in this country we call mortgage debentures secured by trust deed. The bond acknowledges the debt owing to the bearer, and stipulates for the payment of interest; it specifies the property pledged (generally including the earnings), and contains other stipulations, *e.g.* as to drawings and sinking funds. It also refers to the mortgage deed by which the whole of the issue is further secured. This deed contains further particulars and powers, and is enforceable by foreclosure. There are, of course, in many cases, not only first, but second and other mortgage bonds, and, according to the mode of payment, there are sterling, gold, or currency bonds.

The above are "ordinary mortgage bonds," but the expression includes also (*a*) *Division bonds*, which give a lien only on a division or section of the road, and not on the entire property; (*b*) *Extension bonds*, having prior rights upon a new extension and often an additional lien on the remainder of the company's property; (*c*) *Consolidated* or *General Mortgage bonds*, created when various descriptions of bonds are unified.

Other kinds of bonds are—(1) *Equipment bonds*, issued to acquire rolling stock and secured by a mortgage thereof; (2) *Car Trust Certificates*, issued to assist in purchasing rolling stock on the "easy payment" system, and secured by a lien thereon (see Rawle's *Car Trust Certificates*); (3) *Land Grant bonds*, to be redeemed by the proceeds of sale of the lands granted by Government and pledged as a guarantee for the regular payment of dividends; (4) *Collateral Trust bonds*, which are given by a company to trustees, by pledging to them the stock and bond holding of the company in other concerns.

American railway bonds are as a rule not perpetual, but mature after a fixed period from their issue, being often, however, redeemable earlier, at a premium of 5 or 10 per cent. on the capital advanced.

4. *Debentures*, which vary in extent of charge and consequent value. They are bonds without any special collateral security, and are met with in America only in rare instances, and then only in connection with a corporation or company operating under an English charter. In fact, as a bond across the Atlantic is equivalent to a debenture here,

so an American debenture seems to be sometimes of little if any greater value than a mere bond or unsecured specialty in this country.

5. *Income bonds*, which carry no interest unless it is earned, thus resembling preferred shares, but, on the other hand, conferring no voting rights; like debentures, because they are not specially secured, but unlike them, because the interest is generally non-cumulative. They are, as a rule, issued only in case of re-organisation. There are also *guarantees* by the larger companies in favour of the bonds of subsidiary concerns.

6. *Shares*, subdivided into (*a*) *preference*; (*b*) *common*, or what we should call "deferred" or "ordinary" shares. The only difference between American and English shares which need be noted here is that of the mode of transfer. In England the transfer is by separate deed; in America "the deed or power of attorney is printed on the back of the share certificate, and, the transfer being signed in blank by the registered owner, American railway shares are virtually bearer scrip."

Municipal Securities.—"The implied power of municipal corporations to borrow money to carry on their ordinary operations is a point upon which American cases are not harmonious. There is also an irreconcilable conflict amongst the authorities as to the power to issue bonds or other commercial paper, having the privileges and exemptions accorded to that class of commercial securities" (Beach on *Public Corporations*, s. 884); that is to say, the qualities of negotiable instruments, as regards the right of a *bonâ fide* holder for value to take the same free from intermediate equities. On the other hand, it is "easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds" (*Brenham* v. *German-American Bank*, 1892, 144 U. S. 173; 12 Sup. Ct. Rep. 550; and see Beach's *Modern Law of Contracts*, p. 1528 *et seq.*).

Securities of Private Corporations.—As regards private corporations, each State has laws peculiar to itself, and a very useful statement of the liabilities of stockholders as existing in the year 1893 in the various States is given in Beach on *Private Corporations*, ss. 115-180. Assuming the laws to be now in substance the same, citizens of one State may incorporate a commercial or manufacturing company in another State, even for the purpose of carrying on the entire corporate business in the State where they live (*ibid.* s. 934); and New Jersey is "the favourite State for incorporations," and attracts many fees from the enterprise of New York, where fees are high and laws are not so favourable. West Virginia has been described as the "snug harbour for roaming and piratical corporations." In Ohio, stockholders are liable doubly on their stock, and in California they are liable for all corporate debts (that is to say, each stockholder is individually and personally liable for such proportion of the corporation's debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of his stock or shares bears to the whole of the subscribed capital stock or shares of the corporation (Constitution, art. 12; Civil Code, s. 322)). Illinois is a State where incorporation is cheap and corporations are fairly treated; Maine is not so good. Enough has been said to show that investing in American companies' shares should be preceded by strict inquiries of a more or less legal character. The statutes should, of course, be consulted in each case. There are in America certain constitutional provisions affecting corporations, and the Federal Courts to some extent check the growth

of unreasonable State legislation. The Federal Government itself has granted a few charters—to national banks and to railways in the territories. The incorporation of national banks was authorised by a general statute in 1863, and other Acts have since been passed. And, irrespective of statute law, incorporation usually releases stockholders from liability for corporate debts, except to the extent of their unpaid subscriptions. "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability" (Beach's *Modern Law of Contracts*, p. 1381). "Ordinarily these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liabilities arise after the usual remedies against the corporation have been exhausted" (*Ibid.* p. 1370). In the State of New Jersey, where a corporation's property has proved insufficient to satisfy its debts and obligations, each stockholder is liable for the amount of his unpaid subscriptions, or such proportion thereof as shall be necessary to satisfy the debts of the company, and meet the expenses of winding-up, *but no more*. Sec. 21 of New Jersey Corporations Act; Dill's *Law of Private Companies*, 4th ed. [1902], p. 49; but under sec. 22 the directors may from time to time make assessments or calls on shares of stock, not exceeding in the whole the par value thereof. The State Legislatures, however, sometimes increase the liability—rarely in the case of railway companies, frequently in the case of manufacturing corporations, and nearly always as regards banks—and this additional liability may be imposed by the State constitution, by the charter, or by a general statute. Stockholders in national banks are subject to the double liability, of paying up the nominal amount of their holdings, "an amount equal to their stock," in respect of corporate debts. Moreover, if at any time the capital stock of the bank becomes diminished by losses, the comptroller of the currency may compel the stockholders to discontinue business or to "assess" themselves to replace the loss. Sec. 15 of the Constitution of the State of California provides that "no corporation organised outside the limits of this State shall be allowed to transact business within this State on more favourable terms than are prescribed by law to similar corporations organised under the laws of this State." But where a limited company registered under the English Companies Acts had worked mines in California, incurred debts there, and became insolvent, the English Courts held that a shareholder in it was not liable in an action brought against him in this country by a Californian creditor of the company (*Risdon Iron and Locomotive Works* v. *Furness*, [1906] 1 K. B. 49).

[See further, *The Stock Exchange Official Intelligence*, 1905; *American Railroads and British Investors*, by S. F. Van Oss; *Manual of the Railroads of the United States* (annual), by H. V. Poor; *Handbook of Railroad Securities* (annual), issued by the *Commercial and Financial Chronicle*, New York; *Public Corporations and Private Corporations*, 1893, by C. F. Beach, junior, of the New York Bar; *The Modern Law of Contracts*, 1897, by the same author; *Stock and Stockholders*, by W. W. Cook, of the New York Bar; *Municipal Corporations*, by John F. Dillon, Boston; *Commentaries on the Law of Private Corporations*, by Seymour D. Thompson, LL.D., San Francisco, 1895.]

Amicus Curiæ.—A member of the Bar, or other stander-by, who informs the Court when doubtful or mistaken of any fact or decided case (2 Co. Lit. 178).

Ammunition.—See Contraband of War.

Amnesty.—See Pardon.

Amotion.—The name of a proceeding for removing colonial officers and judges for neglect of duty or misbehaviour. Burke's Act, now the Colonial Office Leave of Absence Act, 1782, 22 Geo. III. c. 75, "An Act to prevent the granting in future of any patent office to be exercised in any colony or plantation . . . for any longer term than during such time as the grantee . . . shall discharge the duty thereof in person and behave well therein," after reciting the practice of granting such offices to persons intending to reside in Great Britain, who often farmed them out to the best bidder, provided that from thenceforth no such office should "be granted or grantable for any longer term than during such time as the grantee . . . shall discharge the duties thereof in person and behave well therein." In case of wilful absence, neglect of duty, or other misbehaviour in such office, power was given to the Governor and Council of the colony to amove the officer, subject to a right of appeal to the Crown in Council. One of the chief objects of this statute was to give the Governor and Council in the colony power to amove colonial officers appointed, as was then the frequent practice, by patent under the royal sign manual, to hold office during pleasure, and removable by the Crown on the advice of the Secretary of State. In *Ex parte Robertson*, 1858, 11 Moo. P. C. 288; 14 E. R. 704, it was held that the Act did not apply to an office created by a colonial Act empowering the Governor to nominate proper persons, under his hand seal, to hold "during the pleasure of the Governor," even though, in the particular case, the office had been granted by patent under the Great Seal of the colony, and that it only applied to offices held by patent for life, or a term certain (see also *Montagu* v. *Governor-General of Van Diemen's Land*, 1849, 6 Moo. P. C. 489; 13 E. R. 773). In *Cloete* v. *R.*, 1854, 8 Moo. P. C. 484; 14 E. R. 184, the leave to appeal from a removal from office held under a colonial patent does not seem to have been granted under 22 Geo. III. c. 75 (see also 54 Geo. III. c. 61; and 57 & 58 Vict. c. 17), but under the terms of the local ordinance creating the office. In *Willis* v. *Gipps*, 1846, 6 St. Tri. N. S. 311, it was held that 22 Geo. III. applied to judicial officers, but that the order of amotion was bad, because no notice of the proceedings, or opportunity of answering the charges, had been given to the accused judge. The Colonial Office, acting upon the advice of the law officers (Atherton and Palmer), has held that amotion by the Governor and Council, under 22 Geo. III., is applicable to colonial judges who hold office in colonies with responsible government during good behaviour, subject to a power of removal on the address of both Houses of the local legislature, but only in cases where the condition of good behaviour has been broken. The Tasmanian judges, in *Judge Barr's Case*, contended that such a power of amotion was inconsistent with the tenure during good behaviour, and asked that the question should be referred to the Judicial Committee; but this was refused (Todd, *Parliamentary Government in the Colonies*, 2nd ed.,

838). A similar view was acted upon in *Judge Boothby's Case* (*ibid.*), but the question does not appear to have been judicially determined.

Where the judges hold office during the pleasure of the Crown, as in colonies not possessing responsible government, independently of 22 Geo. III. c. 75, a colonial legislature may petition the Crown in Council for the removal of a judge; the petition will then be referred to the Judicial Committee (see PRIVY COUNCIL), or a general committee, who will investigate the charges, and report whether he should be removed or not. This method is described as inconvenient in the Memorandum of the Lords of the Council on the Removal of Colonial Judges, 1870 (6 Moo. P. C. N. S., App.; 16 E. R. 827). It was adopted in *In re Sanderson*, 1847, 6 Moo. P. C. 38; 13 E. R. 596, where the committee declined to advise a dismissal. Again, the Governor, acting under the powers given in his commission and instructions, may, subject to his own responsibility for so doing, suspend a judge holding during pleasure until the pleasure of the Crown be taken. Such an order of suspension has generally, but not always, been referred to the Judicial Committee for report, before the Crown, on the advice of the Secretary of State, removed the judge or revoked the suspension (see the Memorandum cited above). The Governor, before proceeding to suspension, should give the accused person full notice of the charges against him, and call upon him for his answer, and hear it (*ibid.*). This method, and amotion under 22 Geo. III., are recommended by the Lords of the Council as more convenient than a petition from the colonial legislature to the Crown in Council. Such a power of suspension would not appear to apply to judges holding during good behaviour, unless expressly given by the legislature, as in Victoria by the Supreme Court Act, 1890, s. 14. Lastly, as to such judges holding during good behaviour, subject to a power of removal, on address of both Houses, the British North America Act, 1867, 30 Vict. c. 3, s. 99, provides, as to the Dominion of Canada, that "the judges of the superior Courts there shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons." There would appear to be no appeal from such a removal; but in South Australia, where the tenure was during good behaviour, subject to the power of His Majesty to remove on address from both Houses, the Secretary of State, in *Judge Boothby's Case*, refused, in the particular circumstances, to advise the Crown to remove the accused judge without inquiry, and recommended that it should be referred to the Judicial Committee to consider and report. The colonial legislature, however, refused to present a case to the Committee.

[See further on this subject, Todd, *Parliamentary Government in the Colonies*, and *Parliamentary Government in England*.]

[As to departmental proceedings against colonial officials, see Colonial Regulations, rr. 81 *et seq.*]

Amount Secured.—The exact words occur in the Stamp Act, 1891, 54 & 55 Vict. c. 39, with reference to mortgages. Sec. 1 imposes on the instruments mentioned in the first schedule to the Act the stamp duties specified in the schedule, there being charged on a "mortgage bond, debenture, covenant (except a marketable security otherwise specially charged with duty), and warrant of attorney to confess and enter up judgment," a scale of duties in respect of sums up

to, but not exceeding, £300, and, when the amount is over £300, "for every £100, and also for any fractional part of £100 of the *amount secured*," the sum of 2s. 6d. As regards a "collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purposes," a duty of 6d. only is payable "for every £100, and also for any fractional part of £100, of the *amount secured*." In the case of equitable mortgages double the last-named duty is charged. In respect of reconveyances, releases, discharges, surrenders, resurrenders, warrants to vacate, or renunciations of any such securities, the expression "*total amount* or value of the money *at any time secured*" is for obvious reasons substituted for "amount secured." To be within the Act a mortgage must be a "security by way of mortgage for the payment of any *definite and certain* sum of money (see the definition in sec. 86). The words "definite and certain sum" relate to the amount secured, not to the certainty of payment (see *Canning* v. *Raper*, 1852, 1 El. & Bl. 164, and other cases cited, Alpe, 179), and mean the principal sum only — not including charges which the law allows a mortgagee to add to his principal, such as interest (unless capitalised), expenses, bankers' commission, premiums on insurance (though bearing interest), and redemption bonuses on debentures (Alpe, 179, and s. 88 (3)). Where a trust deed secured an immediate debenture issue of £300,000 and a further issue of £540,000 to be issued in certain circumstances and under certain restrictions, it was held that duty must be paid on the whole £840,000 (*City of London Brewery Co.* v. *Commissioners*, [1899] 1 Q. B. 121). In the portion of sched. 1, relating to "marketable securities," the duty is imposed in respect of "the money thereby secured." Where a debenture provided for the repayment of the £100, together with a premium of £7, 10s., duty was held payable on £107, 10s. (*Rowell* v. *Commissioners*, [1897] 2 Q. B. 194); but where the debenture was redeemable at par by annual charges, or at £103 by six months' notice by the company, duty was held chargeable on £100 only (*Knights Deep, Ltd.*, v. *Commissioners*, [1900] 1 Q. B. 217). In sec. 55 (2) the words used are "amount due . . . for principal and interest upon the security." As to the stamps on securities for current accounts and other future advances, see sec. 88. The expression "amount for the time being secured" occurs in the Building Societies Acts, 1874 (s. 15), and 1894 (s. 14), as to which, see *Neath Building Society* v. *Luce*, 1889, 43 Ch. D. 158; *Ex parte Johnson and Greenwood*, 1890, 45 Ch. D. 463; Wurtzburg on *Building Societies*, 4th ed., 79, 80. In the Conveyancing Act, 1881, "mortgage money means money, or money's worth, secured by a mortgage (sec. 2 (6)). See further, *The Law of Stamp Duties*, by E. N. Alpe, barrister-at-law, 10th ed.

Amusement (Place for).—See PUBLIC ENTERTAINMENT.

Analogues of Contraband.—See CONTRABAND.

Analysis.—With the growth of scientific chemistry, chemical analysis has become an almost indispensable means of obtaining truth in judicial inquiries, especially in civil or quasi-criminal proceedings, and of testing the composition of all substances which it is sought to bring within the scope of the laws relating to customs or excise, or to the sale of food for men or cattle, drugs, poisons, seeds, and manures.

Statutory provision for chemical analysis is made—(1) By the Sale of Food and Drugs Acts, 1875, 1879, and 1899, 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 62 & 63 Vict. c. 51; and the Margarine Act, 1887, 51 & 52 Vict. c. 29. (2) By the Fertilisers and Feeding Stuffs Act, 1893, 56 & 57 Vict. c. 56, ss. 4, 5, as to manures and cattle food. (3) By the Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 70, as to analysis of water alleged to be polluted. (4) By the Metropolis Water Act, 1871, 34 & 35 Vict. c. 113, s. 36, as to the quality of the water supplied by the Metropolitan Water Board, made by an examiner appointed by the Local Government Board, and by the obligation placed on that Board by the Metropolis Water Act, 1902, 2 Edw. VII. c. 41, s. 25, which requires them to cause chemical and bacteriological examinations of and experiments as to the condition of the water to be supplied by the Board, and to report the result to the Local Government Board. The Government water examiner is also entitled to inspect the works, etc., of the Water Board (*ibid.*).

Government Analysts.—There is no special statutory provision for the appointment of official analysts, or as to the form or effect of evidence of analysis by experts, in the case of indictable offences, though in the case of charges of murder by poison this form of evidence is essential. The ordinary rules of evidence apply, and the article analysed must be traced through all the hands through which it has passed to the analyst, so as to make its identity certain, and to exclude the possibility of its having been tampered with. The method of analysis is dictated by chemical science, and guarded by medico-legal prudence in the interests of truth (see Taylor, *Medical Jurisprudence*, 5th ed., vol. ii. 323 *et seq.*). For the purposes of public prosecutions the Home Office employs an official analyst.

The Inland Revenue department has a laboratory in Clements Inn Passage, Strand, London, and employs chemical officers to analyse for purposes of excise, and the Court, original or appellate, before which comes any case under the Sale of Food and Drugs Acts must, at the request of either party, send a sample to the Inland Revenue chemists at Somerset House for official analysis (38 & 39 Vict. c. 63, s. 22; 62 & 63 Vict. c. 51, s. 21); and may, if they think fit, do so without any such request (62 & 63 Vict. c. 51, s. 21). See *Suckling* v. *Parker*, 1906, 1 K. B. 527.

The Customs department, in addition to its general powers, has a special power to cause analyses to be made of (*a*) tea imported into and landed as merchandise in any United Kingdom port (38 & 39 Vict. c. 63, ss. 30, 31), to see whether it is adulterated, exhausted, or unfit for human consumption (see *Roberts* v. *Egerton*, 1874, L. R. 9 Q. B. 494); (*b*) adulterated or impoverished articles of food, and particularly margarine (62 & 63 Vict. c. 51, s. 1).

Under the Fertilisers and Feeding Stuffs Act, 1893, 56 & 57 Vict. c. 56, the Board of Agriculture must appoint a chief agricultural analyst, who must not engage in private practice. His remuneration is settled by the Treasury, and payable out of the public purse. His duties are to analyse fertilisers or feeding stuffs, in cases where seller or buyer objects to the certificate of the district analyst. The regulations as to the taking and analysis of samples were made by the Board of Agriculture on June 1, 1897, for England, and for Ireland by the Lord-Lieutenant (Statutory Rules and Orders Revised, ed. 1904, vol. i. pp. 1, 20, 29). His

certificate is evidence, but not conclusive, as if required he must be called as a witness. A Government Bill, No. 79, is before Parliament (1906) to repeal this Act and re-enact it with amendments suggested by the report of a Departmental Committee appointed in 1903.

Analysts of Local Authorities.—The following authorities have power to appoint, and are now required to appoint, a competent public analyst for their respective districts for the purposes of the Sale of Food and Drugs Acts, 1875 and 1879, and the Margarine Act, 1887 :—

1. In the administrative County of London, the Court of Common Council for the City of London, and the Metropolitan Borough Councils created under the London Government Act, 1899, as to their boroughs.

2. In municipal boroughs, having not less than 10,000 population, the Town Council, subject to a power of employing the analyst for an adjoining borough or county (1875, ss. 10, 11 ; 51 & 52 Vict. c. 41, ss. 34, 35).

3. In counties the County Councils (except as to boroughs lying within them and falling under head 2) (38 & 39 Vict. c. 63, s. 10; 51 & 52 Vict. c. 41, ss. 3 (*x*), 38).

The competence of the analyst is tested by requiring him to have competent knowledge of analytical chemistry, therapeutics, and microscopy (62 & 63 Vict. c. 51, s. 3, subs. 5 ; Local Government Board Regulations of 1900 ; Statutory Rules and Orders Revised, ed. 1904, vol. i. pp. 1-5).

Under the Fertilisers and Feeding Stuffs Act, 1893, 56 & 57 Vict. c. 56, County Councils must, and County borough Councils may, appoint or combine with other councils in appointing district agricultural analysts for a whole county or districts of it, or for a combination of counties or boroughs. They are paid out of the county, borough, or district rate, and their duty is to analyse and certify fertilisers and feeding stuffs on the demand of the buyer, in accordance with the regulations of the Act. Regulations have also been made as to the form of certificates by district analysts, and as to their reports to the central authority (Dec. 23, 1893 ; Jan. 6, 1894 ; Statutory Rules and Orders Revised, ed. 1904, vol. i. pp. 26, 35). If the authority fails to appoint, it may be compelled to by *mandamus* at the instance of the Local Government Board or Board of Agriculture ; or by an order of such Board an officer may be appointed to act for the defaulting authority (62 & 63 Vict. c. 51, s. 3, subs. 2, 3, 4).

The certificates of these local analysts are made sufficient evidence of the matters therein stated, subject to the right of insisting on the analyst being called as a witness or of contradicting the certificate by other evidence (*Hewitt* v. *Taylor*, 1896, 1 Q. B. 287 ; 38 & 39 Vict. c. 63, s. 21 ; 56 & 57 Vict. c. 56, s. 5 (5)).

[See also Cripps-Day, *Adulteration*, 1895 ; Bell and Scrivener, *Sale of Food and Drugs*, 4th ed., 1903 ; Bartley, *Adulteration of Food*, 1895 ; Stevenson and Murphy, *Hygiene and Public Health*, 1894, vol. iii. pp. 134-143.] See ADULTERATION.

Anatomy.—See 2 & 3 Will. IV. c. 75, by which the practice of dissecting human corpses is regulated and a licence required for it.

All the dissecting-rooms of medical schools are regularly visited by the three inspectors (Metropolitan, Provincial, and Scotland) appointed by the Home Secretary under the Act. Quarterly returns are sent in giving, where possible, age, name, and sex of the subjects used.

Ancestor.—"Ancestor," says Lord Coke, "is derived of the Latine word *antecessor;* and in law there is a difference between *antecessor* and *prædecessor*. For *antecessor* is applied to a natural person, as *I. S. et antecessores sui;* but *prædecessor* is applied to a body politique or corporate, as *Episcopus London, et prædecessores sui.*" (Co. Lit. 78*b*.) The word is in common usage restricted to lineal ancestors; but in the language of the old writs it was restricted to father, mother, brother, sister, uncle, aunt, niece, and nephew; for the writ of *mort d'ancestor* was founded upon the seisin only of those relatives. (Fitz. N. B. 1958 *c*.; 38 App. Cas. p. 520.) Its ordinary use is to signify any person, either in a direct or a collateral line of ascent in the pedigree, from whom hereditaments may descend to such person's heir. If, upon the death of the ancestor seised of lands in fee-simple, a stranger should obtain possession of the lands before the heir, his act is not properly styled a disseisin but an abatement. (Co. Lit. 277*a*.) (See ABATEMENT OF FREEHOLD.) By the common law, a lineal ancestor was not capable of being heir to any of his issue. (Lit. s. 3.) By the Descent Act, 3 & 4 Will. IV. c. 106, s. 6, this is now altered; and in default of issue of the purchaser, his nearest lineal ancestor is heir, in preference to any collateral claiming through such ancestor, or by reason of default of issue of such ancestor. But in order that the ancestor may be capable of succeeding as heir to his issue, so far as regards lands situate in England, such issue must be legitimate according to the law of England; and it is not sufficient that such issue shall be legitimate according to the law of the country in which such issue was born, having regard to the domicile of the parents at the time of the birth. (*In re Don's Estate*, 1857, 4 Drew. 194; 62 E. R. 75.) In that case a son of parents domiciled in Scotland, born out of wedlock, but made legitimate, according to the law of Scotland, by the subsequent marriage of his parents, had died seised in fee-simple, by purchase, of land in England, after the coming into operation of the Descent Act. On his death, intestate and without issue, the father claimed to be entitled to inherit the land, as heir to his son, by virtue of sec. 6 of that Act. It was held that he was not so entitled, although, in respect to personal status, the son to whom he claimed to inherit was legitimate, upon the ground that for this purpose the law of England requires something more than the personal status of legitimacy, namely, that the qualification for the legitimacy shall be sufficient according to the law of England, and birth *ex justis nuptiis* is an essential feature of such qualification. (Co. Lit. 7*b*; *Doe* v. *Vardill*, 1840, 7 Cl. & Fin. 895; 7 E. R. 1308; 51 R. R. 139.) See ANTENATUS; LEGITIMACY.

Anchor.—An anchor is a necessary part of a ship's equipment, and no vessel is seaworthy without a proper complement of them. All anchors of more than 168 lbs. weight and chain cables used in British ships are required, under penalty, to be of a proper quality and strength. They are required to pass a test prescribed by the Board of Trade (Anchors and Chain Cables Act, 1899, ss. 8, 9, Sched. 2). Certain corporations are allowed, under licence of the Board of Trade, to set up establishments where anchors can be tested. All chain cables and anchors of the weight above mentioned must be tested by qualified persons and stamped, and buying or selling them untested and unstamped for the use of a British ship is a misdemeanor; and every contract

for the sale of an anchor of that weight or chain cable is deemed to imply a warranty to that effect (s. 2). If a ship is alleged to be unseaworthy, and is detained by the Board of Trade, the state of its cables and anchors is to be inquired into (s. 4). All anchors are to be marked by their manufacturers with their names or initials, and a progressive number, and the weight of the anchor (M. S. A., 1894, s. 543). Dealers in marine stores, *i.e. inter alia*, anchors and cables, must have their name and trade painted upon their shops, must keep proper books showing all the stores passing through their hands, may not buy marine stores from persons under sixteen years of age, and may not cut up cables without a written permit from a justice of the peace, and advertising that they have such permit (ss. 538-542). Also every emigrant ship must carry three proper bower-anchors, to the satisfaction of the emigration officer (s. 290).

In navigating a ship the anchor must be carried in a safe position, or, in case of collision with another vessel, the shipowner will be liable for all the damage so caused. Thus a dumb barge, by the negligence of those on board her, collided with a schooner moored in the Thames, but no damage would have been done if the anchor of the schooner had not been hanging from her bow, not stock awash, but above the water, contrary to the Thames Rules; the schooner was held to blame as well as the barge (*The Margaret*, 1881, 6 P. D. 76). But if a compulsory pilot is on board, the position of the anchor is a matter within his province, and the shipowners are not liable for damage caused thereby (*The Monte Rosa*, [1893] P. 23). Vessels anchoring within a roadstead or anchorage of a port are liable to pay *anchorage* for so doing. This is originally a right of the Crown, and subjects can only claim it by special grant (*Free Fishers of Whitstable's Case*, 1869, L. R. 4 H. L. 266). A ship slipping her anchor to avoid collision with another ship, which has approached too close for safety, can recover the value of that anchor from the other vessel (*The Port Victoria*, [1902] P. 25; Marsden, *Collisions*, p. 27). For duties of anchored ships, see COLLISION. Slipping an anchor for the safety of a ship gives the shipowner a claim to general average contribution. See AVERAGE. [Marsden, *Collisions at Sea*, 5th ed., 1904; Abbott, *Merchant Shipping*, 14th ed., 1901.]

Ancient Demesne.—There are two principal senses in which the phrase ancient demesne is commonly used, which, though closely connected, need to be distinguished—(1) It is applied, by way of predicate, to distinguish the manors of ancient demesne; (2) It is used substantively, to denote the tenure by which the socage tenants of those manors held their lands. It is not properly used to denote the tenure by which the manors, or the demesne lands thereof, were held. (Bro. Abr. *Auncien Demesne*, pl. 32.) The expression "frank-fee" is commonly, but not very aptly, applied to the latter tenure, in distinction from the tenure of the socage tenants. The manors of ancient demesne are those which were in the hands of the Crown, in the reign either of Edward the Confessor or of William the Conqueror, and are styled in Domesday, *Terræ Regis Edwardi*, or *Terræ Regis*. (4 Inst. 269.) They are styled by Lord Coke (2 Inst. 542) the "ancient demesnes of the Crown of England;" and were reputed by the law to be ancient patrimonial possessions of the Crown, which were properly kept in the king's hands, to aid in providing a revenue for maintaining the royal

dignity. The socage tenants of these manors were commonly styled the tenants in ancient demesne; and, when used in this sense, the phrase denotes a species of socage tenure, distinguished from common socage by certain peculiar privileges attached to it. These privileges were six in number, and are now all obsolete. The only one of them which requires notice, by reason of its possible bearing upon ancient titles, is the first of those enumerated by Lord Coke, namely, that no action relating to their lands could be maintained in any Court, except the Court Baron of the manor of which they held. Such actions were commenced by a writ, styled a writ of right close, or little or petty writ of right close; as to which, see Fitz. N. B. p. 11; Booth, *Real Actions*, p. 87. If the manor was in the king's hands, the writ was directed to his bailiffs of the manor; but if the manor had been granted to a subject, the writ was directed to the lord. (4 Inst. 469.) The right to prosecute an action in the manorial Court implied the right to compromise it; and, by consequence, the right to levy a fine there. (1 Cr. Fi. & Rec. 86.) A fine of lands held in ancient demesne could not properly be levied in the Court of Common Pleas; but if in fact levied there, the tenure was thereby suspended, and the lands became frankfee, unless and until the fine was reversed upon a writ of disceit brought by the lord of the manor. (1 Roll. Ab. *Auntient Demeasne*, K. pl. 1.) It was doubtful whether, after such reversal, the effect of the fine was wholly destroyed, even as regards the estate of the parties, or whether it merely restored the ancient tenure, without affecting the estate. (1 Bac. Abr. p. 231.)

The writ of right close, and the writ of disceit, were both abolished by the Real Property Limitation Act, 1833, 3 & 4 Will. IV. c. 27, s. 36. The Fines and Recoveries Act, 1833, 3 & 4 Will. IV. c. 74, s. 5, seems in effect to enact that a fine of lands held by the tenure of ancient demesne levied in the lord's Court, subsequently to an unreversed fine levied in the superior Court, shall be valid, notwithstanding the alteration of the tenure by the fine previously levied. It is to be observed that the lord's Court had no power to make proclamations; and, therefore, that no fine there levied could take effect to bar an estate tail, by virtue of the Statutes of Fines. (*Hunt* v. *Bourne*, 1 Ann., 1 Salk., at p. 340, res. 3.)

The tenure of ancient demesne, properly so called, being a species of socage tenure, is of course freehold. But in manors of ancient demesne an ambiguous species of tenure is often found, combining some characteristics of freehold with some of copyhold tenure, requiring admittance in order to perfect an assurance of them, which assurances are sometimes effected by surrender and sometimes by deed, and being held by copy of Court roll, and according to the custom of the manor, but not being expressed to be held at the will of the lord. They are usually styled customary freeholds. It was long considered doubtful whether they were, in law, freehold or copyhold. But it seems now to be settled that the tenure is copyhold, and that the ordinary copyhold law is applicable to them. (See on this subject, *Bishop of Winchester* v. *Knight*, 1717, 1 P. Wms. 406; 24 E. R. 447; *Stephenson* v. *Hill*, 1762, 13 Burr. 1273; *Burrell* v. *Dodd*, 1803, 3 Bos. & Pul. 378; *Doe* v. *Huntington*, 1803, 4 East, 271; *Roe* v. *Vernon*, 1804, 5 East, 51; *Doe* v. *Danvers*, 1806, 7 East, 299; *Brown* v. *Rawlins*, 1806, 7 East, 409; 8 R. R. 652; *Duke of Portland* v. *Hill*, 1866, L. R. 2 Eq. 765.)

[Customary freeholds are not included in the words "real estate" as

used in the Land Transfer Act, 1897. On death, they therefore descend to the heir, or become vested in the devisee (60 & 61 Vict. c. 65, s. 1 (4)).]

Ancient Lights.—The expression "Ancient Light" is used to denote a legal right which the owner of a house or other building has to receive the light which will naturally enter his windows or other similar apertures flowing to them across his neighbour's land; and as a consequence of this right an obligation is imposed on the neighbour not to obstruct the light. It is the undoubted right of every man who has a house to open any windows he pleases, and he does no wrong to his neighbour by so doing, however close the house may be to the land of the latter. By opening a window he immediately obtains a flow of light into his house, and he has a common-law right to that light, just as he has to air or water which naturally comes upon his premises. This right, however, is not a right to *ancient* light, and the neighbour is not debarred from his ordinary right to build on his land even though he obstructs the light; but by the common law, if a house had stood and a window had been opened for so long a time that the memory of man ran not to the contrary, the light became an *ancient* light, which the law would protect, and it was said that the owner of the house had a right to light or an ancient light by prescription (see PRESCRIPTION). Thus the common law remained for centuries till the Prescription Act (2 & 3 Will. IV. c. 71) was passed, by which it was specially provided (s. 3), with reference to light as distinguished from all other easements, that "when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."

This clause of the Act gave rise to considerable litigation, one much debated point being its effect on the common law—whether the common-law principle was entirely superseded thereby, or whether it remained concurrently with the statutory provision. [This question has now been set at rest by the recent decision in *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179, where the *dicta* of Lord Westbury in *Tapling* v. *Jones*, 1865, 11 H. L. C. 290; 11 E. R. 1344, are explained, and it is settled that the nature and origin of the right to light is the same as if the Act had not been passed. "The Act neither enlarges the right of the dominant tenement, nor adds to the burthen of the servient tenement. Its effect is simply this: when the access and use of the light have been enjoyed for the full period which before the Act was supposed to be sufficient to support a prescriptive claim, and the right is then brought into question, it avoids and extinguishes every adverse plea not founded upon an agreement or consent in writing" (*per* Lord Macnaghten, pp. 190, 191).]

As the opening of a new window to receive the light which will enter it from the adjoining land of a neighbour is not unlawful, and the continual enjoyment of the light for twenty years invests the owner of the house with a right to prevent his neighbour building, it follows that the only preventive remedy open to the neighbour is to erect a building or a screen to obstruct the light before the right is acquired against him.

This has sometimes been termed his "right to obstruct," which is obviously an erroneous expression. "If," said Lord Westbury (in *Tapling* v. *Jones*, 1865, 11 H. L. C. 290; 11 E. R. 1344), "my adjoining neighbour builds upon his land and opens numerous windows which look over my gardens or pleasure-grounds, I do not acquire from this act of my neighbour any new or other right than I before possessed. I have simply the same right of building or raising any erection I please on my own land, unless that right has been by some antecedent matter either lost or impaired, and I gain no new or enlarged right by the act of my neighbour." From the principles above set out, it follows that an ancient light is not lost or impaired, if the owner increases the size of his windows or opens new ones. The only means of preventing the acquisition of an increased right or a new easement is for the adjoining owner to erect a screen to obstruct if possible the enlarged portion or the new windows without interfering with the ancient light. See AIR; LIGHT.

[See Gale on *Easements* and Goddard on *Easements*.]

Ancient Meadow.—Meadow which has not been broken up for twenty years (*Murphy* v. *Daly*, 1860, 13 Ir. Com. L. R. 239).

Ancient Monuments.—Provision is made for the better protection of ancient monuments by the Act 45 & 46 Vict., c. 73 (The Ancient Monuments Protection Act, 1882). The expression "ancient monument" includes the site of such monument and such portion of land adjoining the same as may be required to fence, cover in, or otherwise preserve from injury, the monument standing on such site, also the means of access to such monument (s. 11).

The owners of a monument may by deed constitute the Commissioners of Works guardians thereof, and they then have the right to inspect and maintain it. The owner's estate and title is not thereby affected (s. 2), except that the owner has relinquished his right of ownership, so far as relates to any injury or defacement of the monument (s. 6). Where an owner is a minor, or of unsound mind, or a married woman, the guardian committee or husband, as the case may be, of such owner is the owner for the purpose of the Act (s. 9). Everyone deriving title to an ancient monument from, through, or under any owner who has constituted the Commissioners its guardians, shall be bound by the deed executed by the owner for the purpose (s. 9). Sec. 3 empowers the Commissioners to purchase ancient monuments. Any person may (s. 4) by deed or will give, devise, or bequeath an ancient monument to the Commissioners. By sec. 6 penalties are imposed for injuries or defacement of ancient monuments.

The question of the right of access by the public to the "Stonehenge" remains has recently been brought into Court, and led to a long and careful examination of the general rights of access to monuments on private property. Generally, the public cannot acquire by user any right to visit a public monument or any other object of interest upon private property, and no trust to permit such access will be presumed against owners who can show a clear documentary title; nor can any public right-of-way to such a monument or object of interest be acquired by user only.

"The liberality with which landowners in this country have for years

past allowed visitors free access to objects of interest on their property is amply sufficient to explain the access which has undoubtedly been allowed for many years past to visitors to Stonehenge from all parts of the world. It would, indeed, be unfortunate if the Courts were to presume novel and unheard-of trusts or statutes from acts of kindly courtesy, and thus drive landowners to close their gates in order to preserve their property" (*per* Farwell, J., in *Attorney-General* v. *Antrobus*, [1905] 2 Ch., at p. 199).

Ancient Rent.—See ACCUSTOMED RENT, and cases and authorities there cited.

And.—In a will, the word "and" is sometimes construed "or"; this is generally done to favour the vesting of a legacy (Jarman on *Wills*, 5th ed., i. 483; *Hetherington* v. *Oakman*, 1843, 2 Y. & C. C. 299; 63 E. R. 134; 60 R. R. 154; *Hawes* v. *Hawes*, 1747, 1 Ves. Sen. 13; 27 E. R. 859). As to the cases in which, in gifts over, "and" will be read "or," see Theobald, *Wills*, 6th ed., 672; and see Stroud, *Jud. Dict.*

Anglican Communion.—See CHURCH OF ENGLAND.

Angling.—See GAME LAWS; and as to nuisance in regard to rights of, see *Fitzgerald* v. *Firbank*, [1897] 2 Ch. 96.

Animals.—1. LIABILITIES IN RESPECT OF ANIMALS:—

Strays.—The owner or bailee of cattle, horses, or such animals as are usually kept in restraint (not including dogs, pigeons, and the like) (*Saunders* v. *Teape*, 1884, 51 L. T. 263), is liable for damage done by them if they are allowed to stray (*Ellis* v. *Loftus Iron Co.*, 1874, L. R. 10 C. P. 10), provided that the damage is the natural and probable consequence of their escape, but he is not liable for injuries of a kind there was no reason to expect the escaping animals to occasion (*Cox* v. *Burbidge*, 1863, 13 C. B. N. S. 430). There is no liability, apart from negligence, for damage done by cattle which stray from a highway when being lawfully driven along it (*Tillett* v. *Ward*, 1882, 10 Q. B. D. 17). See FENCE. To allow horses, cattle, sheep, goats, or swine to stray or lie on the highway, is an offence under the Highway Act, 1864, s. 25; and, under the Towns' Police Clauses Act, 1847, s. 24, cattle straying in a "street" may be impounded.

[Dogs are property within the meaning of the Larceny Act, 1861, s. 102 (*Mirams* v. *Our Dogs Publishing Coy., Ltd.*, [1901] 2 K. B. 564).]

Mischievous or Vicious Animals.—Anyone who keeps an animal of a savage or mischievous species, as a lion, monkey, or elephant (*Filburn* v. *People's Palace Co.*, 1890, 25 Q. B. D. 258), is bound to keep it safely at his peril, and apart from any question of negligence (see *F. Fletcher* v. *Rylands*, 1866, L. R. 1 Ex. 265; L. R. 3 H. L. 330, and Pollock on *Torts*, ch. xii.). [The owner of such an animal is not, however, liable to a person who brings the injury upon himself (*Marlor* v. *Bull*, 1900, 16 T. L. R. 239.] But the keeper of animals which are not, by the nature of their species, accustomed to attack mankind, as dogs, cattle (*Hudson* v. *Roberts*, 1851, 6 Ex. Rep. 697), or horses (*Hammack* v. *White*, 1862, 11 C. B. N. S. 588), is not in general liable for injuries due to their viciousness, unless he has notice of their dangerous character (*scienter*) (*Worth* v. *Gilling*, 1866,

L. R. 2 C. P. 1). And the notice must be notice that the animal in question has attacked or is likely to attack mankind (*Osborne* v. *Choqueel*, [1896] 2 Q. B. 109). Injuries by dogs to cattle, horses (*Wright* v. *Pearson*, 1869, L. R. 4 Q. B. 582), or pigs (*Child* v. *Hearn*, 1874, L. R. 9 Ex. 176), or sheep, are excepted from the general rule by 28 & 29 Vict. c. 60, which dispenses with the necessity of proof of "a previous mischievous propensity," or knowledge of it, or negligence, in order to charge the owner. [The owner of a dog which worries sheep which are trespassing on land belonging to the owner of the dog is liable for damages (*Grange* v. *Silcock*, 1897, 77 L. T. 340).] In certain cases the Act makes the occupier of premises where the dog is kept liable for injuries caused by it. [See further, DOGS.]

2. DISEASED ANIMALS; PREVENTION OF DISEASE; IMPORTATION OF FOREIGN ANIMALS (see the Diseases of Animals Act, 1894, which consolidates a number of earlier statutes).—The statute (s. 4) requires any person who has possession or charge of animals (as defined by the Act), which are suffering from disease, to keep them separate from animals not so suffering. It is an actionable wrong to negligently allow animals which are affected with a contagious disease to come into contact with those of other owners (*Cooke* v. *Waring*, 1863, 2 H. & C. 332), but the mere fact of sending such animals to market constitutes no warranty of their freedom from disease in respect of which a buyer can recover (*Ward* v. *Hobbs*, 1878, 4 App. Cas. 13).

3. KEEPING ANIMALS on the premises so as to be injurious to health, and keeping swine in towns; see the Public Health Act, 1875, ss. 44, 47, and 91; the Public Health (London) Act, 1891, ss. 17 and 18; and, as to the Metropolitan Police District, 2 & 3 Vict. c. 47, s. 70 (5).

4. CRUELTY TO ANIMALS is dealt with by the statute 12 & 13 Vict. c. 92. Dishorning cattle is an offence within it (*Ford* v. *Wiley*, 1889, 23 Q. B. D. 203); [but this decision has not been followed in Ireland (*R.* v. *M'Donagh*, 1891, 28 L. R. Ir. 204)]. The statute forbids bull- and bear-baiting, and cock-fighting; and these acts, and also fighting, baiting, or worrying animals generally, are also forbidden by the Towns' Police Clauses Act, 1847, s. 36. [Wild animals are protected by the Wild Animals in Captivity Protection Act, 1900, 63 & 64 Vict. c. 33.] See VIVISECTION.

5. INJURIES TO ANIMALS.—An action lies by the owner or bailee of an animal for any injury caused to it either wilfully or negligently by the act of another, as in the case of any other personal property. Maliciously killing or maiming cattle or other animals is an offence under the Malicious Injury to Property Act, 24 & 25 Vict. c. 97, ss. 40 and 41. Thefts of animals and killing animals for the purpose of theft are in certain cases punishable under the Larceny Act, 24 & 25 Vict. c. 96, ss. 10 to 26. Drugging animals without the owner's authority, or reasonable cause, is an offence under 39 & 40 Vict. c. 13. By the Injured Animals Act, 1894, a police constable is authorised to cause any horse, mule, or ass, which is so severely injured that it cannot without cruelty be led away, to be slaughtered. It appears to be a condition precedent to the authority of the constable to act, that he should first procure a veterinary surgeon's certificate.

See also AGISTMENT; DISTRESS.

6. CARRIAGE OF ANIMALS.—A common carrier of animals is not liable for injuries which an animal sustains through its own vice or unruliness,

if he provided a suitable carriage for it, and was not guilty of any negligence which led to the injury. A carriage to be suitable must secure the animal from injury from the ordinary incidents of the journey, including fright occasioned by its novel position and passing objects (*Blower* v. *G. W. Ry. Co.*, 1872, L. R. 7 C. P. 655). If the injury is due to the owner having supplied deceptive apparatus to secure the animal, *e.g.* a dog's collar which can be slipped, the carrier is not liable (*Richardson* v. *N.-E. Ry. Co.*, 1872, L. R. 7 C. P. 75).

Railway and canal companies have the liabilities of common carriers in respect of animals which they carry (*Blower* v. *G. W. Ry. Co., supra*; *Dickson* v. *G. N. Ry. Co.*, 1886, 18 Q. B. D. 176), subject to any just and reasonable special contract which is in writing, and is signed by the consignor or deliverer (Ry. and Canal Act, 1854, s. 7). They must afford reasonable facilities for carrying animals, including dogs (*Dickson* v. *G. N. Ry. Co., supra*), and cannot, by any notice, limit their liabilities for injuries or loss occasioned by the negligence of their servants (s. 7). As to damages for not affording reasonable facilities, see *Waller* v. *Midland G. W. Ry. Co.*, 1879, 4 L. R. Ir. 376. Their liability is limited to the following sums in respect of each animal—horse £50, neat cattle £15, sheep or pigs £2, unless at the time of delivery higher values of the animals are declared, and in that event a reasonably (*Harrison* v. *L. B. & S. C. Ry. Co.*, 1862, 31 L. J. Q. B. 113) higher rate may be charged (s. 7). The company has the same liability if, in the course of its contract, it carries by sea upon another owner's vessel (Regulation of Railways Act, 1871, s. 12). As to through bookings partly by sea, see Regulation of Railways Act, 1868, s. 14. For regulations respecting food and water, and the movement and transit of animals generally, see Diseases of Animals Act, 1894, and the orders thereunder.

If an animal is not fetched at the conclusion of the journey, it may be put at livery and the cost recovered from the consignee or consignor (*G. N. Ry. Co.* v. *Swaffield*, 1874, L. R. 9 Ex. 132). See CARRIER.

Annates.—This word is and was sometimes used in Acts of Parliament as the equivalent of First-Fruits (see 25 Hen. VIII. c. 20 and 23). Annates, *Primitiæ* or *First-Fruits*, are the profits by the year of every spiritual living.

[*Authorities.*—Godol., *Rep. Can.*, p. 335; Phillimore, *Ecclesiastical Law*, 2nd ed., vol. ii. p. 1355]. See QUEEN ANNE'S BOUNTY.

Annexation is used in international law to denote the adding to its dominions by a State of territory until then not belonging to it. The term is of comparatively modern use, and generalises the modes of territorial acquisition known as CONQUEST (*q.v.*), OCCUPATION (*q.v.*). See, under NATIONALITY, the status of inhabitants in connection with cessions of territory. Upon annexation of territory by the British Government, persons to whom concessions have been made by the former sovereign cannot enforce them against his successor, annexation being an act of State, and the obligations of the new Government under a treaty of cession, either to the former sovereign or to private individuals, not being cognisable by municipal courts (*Cook* v. *Sprigg*, [1899] A. C. 572). As to torts committed by officials of a conquered State before the outbreak of hostilities, see *West Rand Central Gold Mining Co.* v. *R.*, [1905] 2 K. B. 391. As to the successors' rights and obligations as regards debts due to

its predecessors by British subjects, and debts of its predecessors to private individuals, and the effect of annexation upon treaties made by its predecessors, see *Law Mag. and Rev.*, xxvi. 344-392, 482, 490; Randolph, *Laws and Policy of Annexation*, 1901; Huber, *Staaten Succession*, 1898; *Report of Transvaal Concessions Committee* (South Africa, 1901 Cd., 623-625).

For annexation under Scots law, see article thereon in Green's *Encyclopædia of Scots Law.*

Annual Rent.—"Annual rent is not annual profit or value" (*per* Bayley, J., *R.* v. *Tomlinson*, 1829, 9 Barn. & Cress. 167; 32 R. R. 620). The expression "net yearly rent" used in that case was held to be equivalent to the rent paid by the tenant after deducting taxes and charges of collection, and *not* the "clear annual rent" after every deduction, including therefore the part to be set aside for repairs and reproduction of the subject of the "rate"; and see *Smith* v. *Corporation of Birmingham*, 1883, 11 Q. B. D. 195, where the meaning of the term is discussed.

Annual Value.—The words "annual value of the land" are not words of art, but mean, in common parlance, a rack-rent, or the value of the gross produce of the land, minus all payments, expenses, interest, labours, and charges on the land, or on the tenant (*per* Watson, B., *In re Elwes*, 1858, 28 L. J. Ex. 47).

Value means "net value" (*per* Ld. Bramwell, *Dobbs* v. *Grand Junction Waterworks Co.*, 1883, 53 L. J. Q. B. 52).

See exhaustive discussion of various meanings in Stroud, *in loc.*

Annuities, as distinct from rent-charges, are dealt with in this article.

An annuity is either a personal liability, or may be given out of personal assets only, or out of real and personal assets.

A rent-charge issues out of the land, and is generally created by a limitation to uses.

1. *Characteristics of Annuities.*—An annuity, if given with words of limitation appropriate to real estate, is a personal hereditament, and will devolve like real estate. But such an annuity is not within the statute *de donis* and cannot be entailed. If it is given to a person and the heirs of his body the donee takes a fee-simple, conditional upon the birth of issue (*Earl of Strafford* v. *Buckley*, 1750, 2 Ves. Sen. 170; 28 E. R. 111; *Turner* v. *Turner*, 1783, Amb. 776; 27 E. R. 497; *Holdernesse* v. *Carmarthen*, 1784, 1 Bro. C. C. 377; 28 E. R. 1188). And for all purposes except descent, such an annuity is personal estate (*Earl of Strafford* v. *Buckley*, 1750, 2 Ves. Sen. 170; 28 E. R. 111; *Aubin* v. *Daly*, 1820, 4 Barn. & Ald. 59; 22 R. R. 623; *Radburn* v. *Jarvis*, 1841, 3 Beav. 450; 49 E. R. 177; 52 R. R. 183).

An annuity charged on real and personal property, if given without words of limitation applicable to realty, is personal estate, and devolves as such (*Taylor* v. *Martindale*, 1841, 12 Sim. 158; 59 E. R. 1902; 56 R. R. 37; *Parsons* v. *Parsons*, 1869, L. R. 8 Eq. 260; *Joynt* v. *Richards*, 1882, 11 L. R. Ir. 278).

By 18 & 19 Vict. c. 15, ss. 12, 13, an annuity, not created by marriage settlement or will, will not affect any lands, tenements, or hereditaments,

as to purchasers, mortgagees, or creditors taking without notice, unless a memorandum as to the annuity is registered at the central office (*Greaves* v. *Tofield*, 1880, 14 Ch. D. 563).

An annuity may be given for life with remainders, and may be limited in the same way as other property. A mere direction that it is not to be alienated, or not to be subject to the Bankruptcy Law, is invalid, but it may be given over and directed to cease upon any event, and a direction for cessor is effectual without a gift over (*Dommett* v. *Bedford*, 1796, 6 T. R. 684; *Brandon* v. *Robinson*, 1811, 18 Ves. 429; 34 E. R. 379; 11 R. R. 226; *Rochford* v. *Hackman*, 1852, 9 Hare, 475; *Joel* v. *Mills*, 1857, 3 Kay & J. 458; *Hurst* v. *Hurst*, 1882, 21 Ch. D. 278).

[As to the construction of a gift of an annuity, followed by a direction that it is to be a charge on certain land, see *In re Trenchard*, [1905] 1 Ch. 82.]

2. *Right of Annuitant to Value of Annuity.*—If a sum is given by will to buy an annuity, or a Government annuity of a fixed amount is to be bought, the annuitant is entitled to have the purchase-money paid over to him, whether the annuity is in possession or reversion. If the annuitant dies before the time when the annuity is to be purchased, his legal personal representatives are, nevertheless, entitled to the purchase-money (*Barnes* v. *Rowley*, 1797, 3 Ves. 305; 30 E. R. 1024; *Bailey* v. *Bishop*, 1803, 9 Ves. 6; 32 E. R. 501; 7 R. R. 132; *Palmer* v. *Crauford*, 1819, 3 Swans. 482; 36 E. R. 945; *Dawson* v. *Hearn*, 1830, 1 Russ. & M. 606; 39 E. R. 232; 32 R. R. 295).

An intention expressed that the annuity is to be for the personal enjoyment of the annuitant will not alter the case; for instance, a discretion conferred on trustees to apply the annuity for the annuitant's benefit, if incapacitated, or a direction that he is not to have the value of the annuity, or that the annuitant, not being a married woman, is to have no power of anticipation (*In re Browne's Will*, 1859, 27 Beav. 324; 54 E. R. 127; *Stokes* v. *Cheek*, 1860, 28 Beav. 620; 54 E. R. 504; *Woodmeston* v. *Walker*, 1831, 2 Russ. & M. 197; 39 E. R. 370; 34 R. R. 56).

There is some conflict of cases as to the effect of a direction that the annuity to be purchased is to go over or cease upon alienation, bankruptcy, or similar events.

If the annuity is to be purchased from Government, in the name of the annuitant, such a direction may be rejected as inconsistent with the gift, and the annuitant may take the money (*Hunt Foulston* v. *Furber*, 1876, 3 Ch. D. 285).

If the annuity is to be purchased by the trustees, it is unsettled whether such a direction is effective or not, so as to prevent the annuitant or his legal personal representatives from claiming the purchase-money. A distinction has also been drawn between a direction that the annuity is to cease on alienation and a gift over on that event (see *Day* v. *Day*, 1853, 61 E. R. 569; 1 Drew. 569, on the one hand, and *Power* v. *Hayne*, 1869, L. R. 8 Eq. 262; *Hatton* v. *May*, 1876, 3 Ch. D. 148, on the other; also *In re Mabbett; Pitman* v. *Holborrow*, [1891] 1 Ch. 707).

In some cases where an estate is being administered by the Court, and proves to be insufficient to pay annuities and legacies in full, a value is put upon the annuity, and the value, after abatement, is paid to the annuitant or his legal personal representatives (*Wroughton* v. *Colquhoun*, 1847, 1 De G. & S. 357; 63 E. R. 1103; 75 R. R. 136; *Carr*

v. *Ingleby*, *ibid.*, 362; 63 E. R. 1105; 75 R. R. 139; *Long* v. *Hughes*, *ibid.*, 364; 63 E. R. 1106; 75 R. R. 142). [See *In re Sinclair; Allen* v. *Sinclair*, [1897] 1 Ch. 921.] For the purposes of abatement the value must be ascertained by adding instalments already accrued, due to the present value of future instalments (*Heath* v. *Nugent*, 1860, 29 Beav. 226; 54 E. R. 613; *In re Wilkins; Wilkins* v. *Rotherham*, 1884, 27 Ch. D. 703).

3. *Duration of Annuities.*—An annuity given by will to a person, without any words defining its duration, whether the annuity be given immediately or after a life interest, is an annuity for the life of the annuitant only (*Blewitt* v. *Roberts*, 1841, Cr. & Ph. 274; 41 E. R. 495; 54 R. R. 291; *Blight* v. *Hartnoll*, 1881, 19 Ch. D. 294).

The fact that the annuity is stated to be for maintenance and education will not, as a general rule, cut it down to an annuity only until the annuitant comes of age (*Wilkins* v. *Jodrell*, 1879, 13 Ch. D. 564).

The rule that an annuity given without words defining its duration is for life only, yields to expression of a contrary intention.

A contrary intention is not to be inferred from the fact that the annuity is charged on a fund, or charged on rents, profits, or income, which on the face of the will appear to be insufficient to do more than pay the annuity (*Going* v. *Hanlon*, 1869, I. R. 4 C. L. 144; *Whitten* v. *Hanlon*, 1885, 16 L. R. Ir. 298; *In re Forster's Estate*, 1889, 23 L. R. Ir. 269; *In re Morgan; Morgan* v. *Morgan*, [1893] 3 Ch. 222).

But it may be inferred if the annuity is given in such a way as to be, in effect, the gift of the income of a fund without limit of time, or if power is given to the annuitant to appoint the annuity in perpetuity, or if the annuity is given over in a manner inconsistent with its being a life annuity only (*Stokes* v. *Heron*, 1845, 12 Cl. & Fin. 161; 8 E. R. 1361; 59 R. R. 662; *Hedges* v. *Harpur*, 1858, 3 De G. & J. 129; 44 E. R. 1218; *Mansergh* v. *Campbell*, 1858, 3 De G. & J. 232; 44 E. R. 1257; *Warren* v. *Wright*, 1861, 12 Ir. Ch. 401; *Barden* v. *Meagher*, 1867, I. R. 1 Eq. 246).

An annuity given for a particular period is not cut down to the life of the annuitant, because it is stated to be for maintenance (*Attwood* v. *Alford*, 1866, L. R. 2 Eq. 479).

An annuity to a trustee for his trouble ceases when the active trusts cease, though it is not necessarily put an end to by a judgment for administration (*Hull* v. *Christian*, 1874, L. R. 17 Eq. 546; *M'Dermot* v. *O'Conor*, 1876, I. R. 10 Eq. 352).

If the duration of an annuity is defined by express words, it lasts during the period defined; and if the donee dies during the period, it passes to his legal personal representatives. Thus an annuity given to A. during B.'s life, goes to A.'s legal personal representatives if he dies before B. (*Savery* v. *Dyer*, 1752, Amb. 139; 27 E. R. 91; *In re Ord.; Dickinson* v. *Dickinson*, 1879, 12 Ch. D. 22).

4. *Survivorship between Annuitants.*—An annuity to A. and B. for their lives goes to them during their joint lives, and to the survivor during his life (*Brudnel's Case*, 1592, 5 Co. 9; *Day* v. *Day*, 1854, Kay, 703; *Moffatt* v *Burnie*, 1853, 18 Beav. 211; 52 E. R. 83; *Neighbour* v. *Thurlow*, 1860, 28 Beav. 33; 54 E. R. 278; *Alder* v. *Lawless*, 1863, 32 Beav. 72; 55 E. R. 28).

An annuity during the lives of A. and B., to be equally divided between them, does not go to the survivor. It may be an annuity during

the joint lives only, or a gift of half the annuity to each annuitant for his life (*Grant* v. *Winbolt*, 1854, 2 W. R. 151; *In re Drakeley's Estate*, 1854, 19 Beav. 395; 52 E. R. 403).

If an annuity is given to two persons as tenants in common during their lives, and the life of the survivor, each takes an annuity during the period defined, and upon the death of one of them his annuity is payable to his legal personal representatives during the other's life (*Eales* v. *Cardigan*, 1838, 9 Sim. 384; 59 E. R. 405; *Jones* v. *Randall*, 1819, 1 Jac. & W. 100; 37 E. R. 313; 20 R. R. 237; *Bryan* v. *Twigg*, 1867, L. R. 3 Ch. 183).

In such cases there may be words sufficient to carry the whole annuity to the survivor (*Doe* v. *Abey*, 1813, 1 M. & S. 428; 14 R. R. 487; *Hatton* v. *Finch*, 1841, 4 Beav. 186; 49 E. R. 310; *Cranswick* v. *Pearson*, 1862, 31 Beav. 624; 54 E. R. 1281; 9 L. T. 275).

And if an annuity is given to several as tenants in common during their lives, and is then given over entire after the death of the survivor, the survivor for the time being takes the whole (*Armstrong* v. *Eldridge*, 1791, 3 Bro. C. C. 215; 29 E. R. 497; *M'Dermott* v. *Wallace*, 1842, 5 Beav. 142; 49 E. R. 531; 59 R. R. 441; *Begley* v. *Cook*, 1856, 3 Drew. 662; 61 E. R. 1056; *Alt.* v. *Gregory*, 1856, 8 De G., M. & G. 221; 44 E. R. 375; *Draycott* v. *Wood*, 1863, 8 L. T. 304).

5. *Charge upon Corpus or Income.*—An annuity may be a charge upon income only, or both upon income and capital. The cases upon this subject are very numerous, and they depend upon nice points of construction. It is proposed here only to state the principal distinctions which have been drawn.

Where an annuity is given and there is then a gift of residue, the annuity is a charge upon *corpus*, and the fact that there are directions to set aside a fund to pay the annuity does not alter the case (*Carmichael* v. *Gee*, 1880, 5 App. Cas. 588).

On the other hand, if the only direction is to set aside a fund to pay an annuity, and the fund is given over at the death of the annuitant, it is a case of tenant for life and remainder-man of a fund, and the annuity is not charged upon *corpus* (*Baker* v. *Baker*, 1858, 6 H. L. C. 616; 10 E. R. 1436).

If the only gift is to be found in a direction to pay the annuity out of the rents and profits of particular property, or out of the income of a residue, the annuity is a charge on the *corpus*, if the property or residue is given, subject to or after payment of the annuity (*Birch* v. *Sherratt*, 1867, L. R. 2 Ch. 644; *In re Mason; Mason* v. *Robinson*, 1878, 8 Ch. D. 411; *Bell* v. *Bell*, 1872, Ir. R. 6 Eq. 239; *In re Moore's Estate*, 1887, 19 L. R. Ir. 365).

But when the only gift is out of income, if the *corpus* must be taken to have been intended to remain, or is treated as intact at the annuitant's death, the annuity is only a charge upon income (*Foster* v. *Smith*, 1845, 1 Ph. 629; 41 E. R. 772; 65 R. R. 472; *Taylor* v. *Taylor*, 1874, L. R. 17 Eq. 324).

As a general rule, where a life annuity is payable out of income, arrears of one year are payable out of future income accruing during the annuitant's life, unless there is something to show that each year's annuity must be paid only out of the income of that year; and the annuity may be so expressed as to make arrears payable out of income accruing after the annuitant's death (*Stelfox* v. *Sugden*, 1859, John. 234;

Booth v. *Coulton*, 1870, L. R. 5 Ch. 684; *Taylor* v. *Taylor*, 1874, L. R. 17 Eq. 324; *Wormald* v. *Muzeen*, 1881, 17 Ch. D. 167).

6. *Remedies of Annuitants.*—An annuitant whose annuity is a charge upon the residue of an estate is not entitled to have the residue realised and invested to secure the annuity, if it can be otherwise sufficiently secured (*In re Potter*; *Potter* v. *Potter*, 1884, 50 L. T. 8; *In re Parry*; *Scott* v. *Leak*, 1889, 42 Ch. D. 570).

An annuitant, whose annuity is charged upon a residue, is entitled to have a sufficient fund set aside to pay the annuity, but when this has been done he cannot delay the distribution of the rest of the estate (*Harbin* v. *Masterman*, [1896] 1 Ch. 351).

7. *Annuities as affected by the Statutes of Limitation.*—If the annuity is only secured by the personal liability of the grantor, the Statutes of Limitation, 21 Jac. I. c. 16, 9 Geo. IV. c. 14, 3 & 4 Will IV. c. 42, begin to run against each instalment as it accrues (*Amott* v. *Holden*, 1852, 18 Q. B. 593; *Edwards* v. *Warden*, 1874, L. R. 9 Ch. 495, 1 App. Cas. 281).

An annuity charged on land is within sec. 42 of the Real Property Limitation Act, 1833, 3 & 4 Will IV. c. 27, so that only six years' arrears can be recovered, and non-payment for twelve years bars the annuity altogether (*James* v. *Salter*, 1837, 3 Bing. N. C. 544; 43 R. R. 741; *Francis* v. *Grover*, 1845, 5 Hare, 39; 71 R. R. 26; *Irish Land Commission* v. *Grant*, 1884, 10 App. Cas. 14).

Having regard to sec. 10 of the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57, it would seem to make no difference that the annuity is secured by an express trust (see, however, *Hughes* v. *Coles*, 1884, 27 Ch. D. 231).

An annuity charged on personalty only is not within sec. 42 of the Act of 1833, but it is a legacy within sec. 40 of that Act and sec. 8 of the Real Property Limitation Act, 1874, 37 & 38 Vict. c. 57 (*Roch* v. *Callen*, 1847, 6 Hare, 531; 77 R. R. 224; *Ashwell's Will*, 1859, John. 112).

An annuity charged on real and personal estate is within sec. 42 of the Act of 1833, and is barred by non-payment for twelve years (*Dower* v. *Dower*, 1885, 15 L. R. Ir. 264; *In re Nugent's Trusts*, 1885, 19 L. R. Ir. 140).

8. *Abatement of Annuities.*—An annuitant is subject to the same rule of abatement as a general legatee (see ABATEMENT OF LEGACIES) if the annuity is charged upon the personal estate (*Innes* v. *Mitchell*, 1846, 1 Ph. 710; 2 Ph. 346; 41 E. R. 803, 976; *Miller* v. *Huddlestone*, 1851, 3 Mac. & G. 513; 42 E. R. 358). Accordingly, where there is a deficiency of assets, there is no priority as between annuitants and legatees, and both must abate proportionately. The rule is the same whether the annuity is to commence immediately on the death of the testator, or at a future time (*Innes* v. *Mitchell*, *supra*). Annuities abate between themselves as well as with reference to other legacies (*s.c.*).

To calculate the value of annuities for purposes of abatement, their value is to be taken at the time when the estimate is made. The value of the annuity of a dead annuitant is the sum of the payments which would have been made to him in respect of it; and the value of a reversionary annuity which has come into possession, is its present value according to the Government tables at the time of abatement plus any arrears due upon it (*Todd* v. *Bielby*, 1859, 27 Beav. 353; 54 E. R. 138; *Potts* v. *Smith*, 1869, L. R. 8 Eq. 683; *Delves* v. *Newington*, 1885, 52

L. T. 512; [*In re Metcalf*, [1903] 2 Ch. 424]). The rule is the same where all the annuitants are alive (*Heath* v. *Nugent*, 1860, 29 Beav. 226; 54 E. R. 613; *In re Wilkins; Wilkins* v. *Rotherham*, 1884, 27 Ch. D. 703). Where the testator's estate is being administered by the Court (see *In re Nicholson's Estate*, 1875, I. R. 11 Eq. 177), and proves insufficient to pay the legacies and annuities given, so that an abatement is necessary, a value will be put upon the annuities as from the testator's death, and the annuitant or his representatives will be entitled to the valued amount after abatement (*Wroughton* v. *Colquhoun*, 1847, 1 De G. & Sm. 357; 63 E. R. 1103; 75 R. R. 136; *Carr* v. *Ingleby*, 1827, *ibid.* 362; 63 E. R. 1105; 75 R. R. 139; *Long* v. *Hughes*, 1831, *ibid.* 364; 63 E. R. 1106; 75 R. R. 142). This principle does not apply to annuities determinable on marriage or bankruptcy (*Carr* v. *Ingleby, supra; Gratrix* v. *Chambers*, 1860, 2 Gif. 321; see also *Wright* v. *Callender*, 1852, 2 De G., M. & G. 652; 42 E. R. 1027; *Carmichael* v. *Gee*, 1880, 5 App. Cas. 588).

Annuity Issuing out of the Land.—If annuities are given as specific gifts of interest in the real estate, they do not abate with legacies charged generally upon the real estate (*Creed* v. *Creed*, 1844, 11 Cl. & Fin. 491; 8 E. R. 1187; 65 R. R. 253; *In re Briggs*, 1881, 29 W. R. 925). Where legacies and annuities are charged upon real estate, powers of distress and entry conferred upon the annuitants do not give the annuities priority over the legacies (*Roper* v. *Roper*, 1876, 3 Ch. D. 714).

[See further, article DEATH DUTIES.]

9. *Miscellaneous.*—An annuity given by a will is included in the term legacies, used in the will, unless there is evidence of a contrary intention (*Heath* v. *Weston*, 1853, 3 De G., M. & G. 601; 43 E. R. 236; *Gaskin* v. *Rogers*, 1866, L. R. 2 Eq. 284).

And annuities are payable in the same order of priority as legacies, unless there is something in the will to give them priority (*Miller* v. *Huddlestone*, 1851, 3 Mac. & G. 513; 42 E. R. 358).

A gift by will of a clear annuity means an annuity free from legacy duty, but a direction to invest a sum sufficient to produce a clear annual sum, and pay the income of the fund to the legatee, is not free from duty, as the word "clear" in that case may be referred to the costs of investment (*Haynes* v. *Haynes*, 1853, 3 De G., M. & G. 590; 43 E. R. 232; *Pridie* v. *Field*, 1854, 19 Beav. 497; 52 E. R. 443).

A gift by will of an annuity, free from deductions, does not entitle the annuitant to have the income-tax paid at the expense of the estate, unless there is something to show that the testator includes income-tax in the word deductions (*Gleadow* v. *Leatham*, 1882, 22 Ch. D. 269; *In re Buckle; Williams* v. *Marson*, [1894] 1 Ch. 286).

An annuity given by will commences from the testator's death, and, if payable quarterly or half-yearly, the first payment is due at the end of the first quarter or half-year from the death (*Houghton* v. *Franklin*, 1823, 1 Sim. & St. 390; 57 E. R. 156; 24 R. R. 201).

Arrears of an annuity do not as a general rule carry interest (*Torre* v. *Browne*, 1855, 5 H. L. C. 555; 10 E. R. 1018; *Edwards* v. *Warden*, 1876, 1 App. Cas. 281; [*In re Hiscoe; Hiscoe* v. *Waite*, 1902, 71 L. J. Ch. 347]).

Answer.—This was the name for the defendant's pleading in reply to the facts alleged in the bill filed by the plaintiff in a Chancery

suit, under the old system before the Judicature Act. It differed from pleas at common law chiefly in two particulars: (1) That the defendant in his answer went minutely into the details of his evidence instead of relying on general denials; (2) That he swore to the truth of its contents. Its place is now taken by a defence. In divorce proceedings, the reply of the respondent to the petition is still called an answer.

Ante litem motam.—Before litigation commenced.

Antecedent Debt.—An expression used in different branches of law, as equivalent to a past or pre-existing debt, especially in connection with the subject of consideration. An admission of an antecedent debt, or a promise to pay it, by the debtor, may be relied on either as an account stated (*q.v.*), or merely as evidence of the original cause of action. As to the distinction in pleading, see R. S. C., Order 20, r. 8. A promise by A. to pay a debt due by B. is not binding unless there be some new consideration, such as a giving of credit or forbearance to press for payment, or unless credit was originally given to B. at A.'s request (*Johnston* v. *Nicholls*, 1845, 1 C. B. 251). But if a guarantee for the repayment of an advance is ambiguous, parol evidence may be given to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee (*Haigh* v. *Brooks*, 1840, 10 Ad. & E. 309; 50 R. R. 399; *Goldshede* v. *Swan*, 1847, 1 Ex. Rep. 154), or that the guarantee was intended to be a continuing security for the balance of a current account (see *In re Boys*, 1870, L. R. 10 Eq. 467). When a mercantile agent pledges his principal's goods for an "antecedent debt," the title of the principal is not affected; by sec. 4 of the Factors Act, 1889, the pledgee acquires "no further right to the goods than could have been enforced by the pledgor at the time of the pledge." The lien of a factor upon goods intrusted to him for sale by his principal does not extend to a debt incurred before his employment as factor (*Houghton* v. *Matthews*, 1803, 3 Bos. & Pul. 485; 7 R. R. 815). An assignment of the whole of a debtor's property in consideration of a past debt, there being no substantial present equivalent for the assignment, and no *bonâ fide* agreement to make further advances, is necessarily an act of bankruptcy (*In re Wood*, 1872, L. R. 7 Ch. 302). On the other hand, an antecedent debt is a good consideration within the meaning of the Statute 13 Eliz. c. 5; so that, in order to set aside the transaction under the statute, it is necessary to show that it was not *bonâ fide*. If the assignment deals only with a part of the debtor's property, it may be void as a fraudulent preference. As to the distinction between an antecedent debt and an antecedent liability which has not yet ripened into a debt, see *Kaltenbach* v. *Lewis*, 1885, 10 App. Cas. 617; *Mayer* v. *Mindlevich*, 1888, 59 L. T. 400; *Richardson* v. *Harris*, 1889, 22 Q. B. D. 268.

Antenatus denotes a child born before the marriage of its parents. Legitimation *per subsequens matrimonium* was first ordained by a constitution of Constantine as to existing children, and the civil law ultimately allowed legitimation in all cases if the parents had lived in concubinage. The canon law recognises all *antenati* to be as legitimate to inherit as children born after marriage (Burge, *Foreign and Colonial Laws*, vol. i. 92. See p. 101, *ibid.*, for the laws prevailing in different countries).

Foreign jurists generally agree that as the validity of a marriage depends on the law where it is celebrated, the same law ought to govern the legitimacy of the offspring; so that if, in the country of marriage,—at all events, if the parents were domiciled there,—*antenati* would be legitimated, they ought to be legitimated in all countries for all purposes, including heirship of real estate (Story, *Conflict of Laws*, 8th ed., p. 118).

Subsequent marriage in England does not remove illegitimacy, though it does in Scotland, where *antenati* inherit as heirs.

English law was settled as to heirship since the Statute of Merton, c. 9, when the earls and barons resolved that they would not change the law of England that an *antenatus* could not inherit land. It was so decided in *Doe* v. *Vardill*, 1840, 2 Cl. & Fin. 571; 7 Cl. & Fin. 895; 6 E. R. 1270; 7 E. R. 1308; 51 R. R. 139. Nor can a father inherit from his *antenatus* son (*Don's Estate*, 1857, 4 Drew. 194; 62 E. R. 75). This rule does not apply to devises by will, under which *antenati* can take (*Grey* v. *Stamford*, [1892] 3 Ch. 88).

An *antenatus* cannot be legitimated *per subsequens matrimonium* unless the father was domiciled in a country whose laws allowed such legitimation both at the time of birth and of marriage (*Vaucher* v. *Solicitor of the Treasury*, 1887-88, 40 Ch. D. 216; *Wright's Trusts*, 1856, 2 Kay & J. 595).

It was assumed in *Doe* v. *Vardill* that an *antenatus*, legitimated by the law of his country, could succeed to personal estate; and it was decided in *Andros* v. *Andros*, 1883, 24 Ch. D. 637, that an *antenatus* was entitled to share in personalty left by will. In *Skottowe* v. *Young*, 1871, L. R. 11 Eq. 474, an *antenatus* was held only liable to one per cent. legacy duty on the proceeds of sale of English land devised on trust to sell.

An *antenatus* can participate under the Statute of Distributions (*Goodman's Trusts*, 1881, 17 Ch. D. 266, overruling some previous cases). The term *antenatus* has also been applied, in contradistinction to *post-natus*, *i.e.* a person born after a change of sovereignty, *e.g.* after the accession of King James VI. of Scotland to the English throne (*Calvin's Case*, 1608, 7 Co. Rep. 1); or after the acknowledgment of the independence of the United States of America (*Doe d. Thomas* v. *Acklam*, 1824, 2 B. & C. 799; 26 R. R. 544). In the former of these cases, it was held that a man born in Scotland after the accession of James to the English throne, and before the Act of Union of the Kingdom, is a natural-born subject, having the capacity at common law to hold lands in England; in the latter, that one born in the United States since the Treaty of 1783, by which these States were acknowledged to be free, sovereign, and independent, is an alien so as to be incapable, by the common law, of inheriting land in England.

See BASTARD; LEGITIMACY.

Anticipation, Restraint on.—See HUSBAND AND WIFE.

Any.—"Any" is a word which excludes limitation or qualification (*per* Fry, L.J., *Duck* v. *Bates*, 1884, 13 Q. B. D. 843; and see *Beckett* v. *Sutton*, 1882, 51 L. J. Ch. 433). But its generality may be restricted by the subject-matter or the context (*Ex parte Bagster*, 1883, 24 Ch. D. 477).

The various meanings of which "any" is capable in different circumstances are exhaustively set out in Stroud.

Apartments.—An agreement to let or take apartments in a house, which, if executed by entry, would amount to a demise, is a contract of an interest in lands, within sec. 4 of the Statute of Frauds, and must be in writing (*Inman* v. *Stamp*, 1815, 1 Stark. 12; 18 R. R. 740; *Edge* v. *Strafford*, 1831, 1 Cromp. & J. 391; 35 R. R. 746); not so an agreement for board and lodging where no specific rooms are demised to the lodger (*Wright* v. *Stavert*, 1860, 2 E. & E. 721; 29 L. J. Q. B. 161). A person who has agreed to take apartments, but who has never entered, is not liable for use and occupation, but may be sued for damages for breach of his agreement to become tenant (*Edge* v. *Strafford, supra*; *Lowe* v. *Ross*, 1850, 5 Ex. 553; 19 L. J. Ex. 318; *Towne* v. *D'Heinrich*, 1853, 13 C. B. 892; 22 L. J. C. P. 219).

As to stamp duty, see sec. 78 of the Stamp Act, 1891.

If the tenant has entered into occupation, he may maintain a possessory action for a disturbance of his possession and enjoyment of the premises (*Wright* v. *Stavert, supra*)—a remedy which is not open to a mere lodger (see *Monks* v. *Dykes*, 1839, 4 Mee. & W. 567; 51 R. R. 720). In the absence of an agreement to the contrary, the tenant has also an incidental right to the use of everything necessary to his enjoyment of the premises, such as the door-bell and knocker, the skylight of the staircase, and the water-closet (*Underwood* v. *Burrows*, 1835, 7 C. & P. 26; 48 R. R. 753). The landlord is under no implied obligation to take care of the goods of his tenant (*Holder* v. *Soulby*, 1860, 8 C. B. N. S. 254; 29 L. J. C. P. 246), though he will be liable for loss caused by his gross negligence or misconduct (*Clench* v. *d'Arenberg*, 1883, C. & E. 42).

The rent of furnished apartments is deemed to issue entirely out of the realty, and may therefore be distrained for (*Newman* v. *Anderton*, 1806, 2 Bos. & P. N. R. 224); but certain occupiers are within the Lodgers' Goods Protection Act, 1871, 34 & 35 Vict. c. 79. See DISTRESS.

In letting furnished apartments for immediate occupation, the landlord impliedly undertakes, in the absence of express stipulation, that they are in a habitable state (*Sutton* v. *Temple*, 1843, 12 M. & W., at p. 60; 67 R. R. 260; *Hart* v. *Windsor*, 1843, 12 M. & W., at p. 84; 67 R. R. 279; *Wilson* v. *Finch-Hatton*, 1877, 2 Ex. D. 336; 46 L. J. Ex. 489; approving the decision in *Smith* v. *Marrable*, 1843, 11 Mee. & W. 5; 63 R. R. 493; see also *Campbell* v. *Lord Wenlock*, 1866, 4 F. & F. 716). This implied obligation is not merely a warranty for breach of which the landlord is liable in damages; it is a condition, upon breach of which the tenant may at once rescind the contract and refuse to occupy the premises or pay the rent. The condition is broken if the rooms are so infested by vermin (*Smith* v. *Marrable, supra*), or so insanitary, by reason of defective drainage (*Wilson* v. *Finch-Hatton, supra*), or of the presence of contagious illness (*Bird* v. *Greville*, 1884, C. & E. 317), as not to be reasonably fit for habitation. But the implied obligation relates only to the time fixed for the commencement of the tenancy; there is no implied warranty that the apartments shall remain in a sanitary condition during the tenancy, even if the landlord resides in the house and supplies attendance and service (*Sarson* v. *Roberts*, [1895] 2 Q. B. 395).

Furnished apartments being ordinarily let for short periods, a

tenancy from year to year is not readily inferred (see *Wilson* v. *Abbott*, 1824, 3 Barn. & Cress. 88); but, except in this respect, the law relating to the duration of the tenancy and the requisite notice to quit does not differ from the law applicable to tenancies generally. See LANDLORD AND TENANT; LODGER; NOTICE TO QUIT.

Apology.—By sec. 2 of Lord Campbell's Act, 6 & 7 Vict. c. 96, it is a defence to an action for a libel contained in any public newspaper, or other periodical publication, for the defendant to plead and prove that the libel was inserted "without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel." The defendant must pay money into Court with any plea under this section, or it will be treated as a nullity (8 & 9 Vict. c. 75, s. 2). Hence no other defence denying liability can now be joined with such a plea (Order 22, r. 1). But the fact that such a payment has been made must not be mentioned to the jury (Order 22, r. 22; *Veale* v. *Reid*, 1904, 117 L. T. Jo. 292).

Again, by sec. 1 of the same Act, the defendant in any action for defamation may "give in evidence, *in mitigation of damages*, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology." The defendant must give notice to the plaintiff of his intention to tender such evidence at the time when he delivers his defence.

And wholly apart from these sections, a defendant is always allowed to give evidence of any apology or other amends in mitigation of damages, even though such apology was not made "at the earliest opportunity after the commencement of the action" (*Smith* v. *Harrison*, 1856, 1 F. & F. 565). Sometimes the defendant apologises for the first time in his defence, though such pleading is not strictly permissible. But a tardy or reluctant apology will not help a defendant much, especially if the plaintiff demanded an apology before action without success.

A retractation should be made as publicly as the charge, and as far as possible to the same persons. In the case of a slander, heard only by few, the plaintiff should be content with a letter of apology addressed to himself, fully retracting the charge, which can be shown to everyone who heard the defendant's words. But if the charge was made publicly in a newspaper, the apology also should be made publicly, and in the same newspaper. It should be printed in type of ordinary size, and in a part of the paper where it will be seen; not hidden away among the advertisements or notices to correspondents (*Lafone* v. *Smith*, 1858, 3 H. & N. 735). The defendant should also do all in his power to stop any further circulation of the libel. Where the defendant has agreed that the plaintiff may publish the apology, it would seem that, in the absence of any stipulation to the contrary, the plaintiff may continue to publish it as long as he pleases. Thus in *Fisher & Co.* v. *Apollinaris Co.*, 1875, L. R. 10 Ch. 297, where the plaintiff had agreed that the defendant company might make such use of the apology as they thought necessary, and the defendant company published it continuously for two months, the Court of Appeal refused to grant an injunction.

An apology should always be frank and full. If made promptly it will often put an end to the action. But a guarded, half-hearted apology will be of no avail. The defendant must not try to exculpate himself or justify his conduct. It is no use to publish a paragraph expressing astonishment at the receipt of a lawyer's letter, and attempting to explain away or minimise an imputation clearly made. It is still worse to assert, as is sometimes done, that the defendant has done the plaintiff a kindness in making a false charge against him, as it "has afforded him an opportunity of publicly denying it!" A mere correction is not an apology. A statement cannot be called an apology, unless it both unreservedly withdraws all imputation and expresses regret for having made it. The essence of an apology is the statement, "We are satisfied that you are innocent" (*per* Mathew, L.J., in *Worsley* v. *Hulton, Daily Telegraph*, March 24, 1905). The sufficiency or insufficiency of an apology is peculiarly a question for the jury. Though it should be full, it need not be abject; the defendant is not bound to insert an apology dictated by the plaintiff; but it must be such as an impartial person would consider reasonably satisfactory under all the circumstances of the case (*Risk Allah Bey* v. *Johnstone*, 1868, 18 L. T. 620).

FORMS.

I.—*Letter Demanding an Apology.*

To the Editor of the

_____ _____.

Sir,—The attention of our client, Mr. A. B., has been called to a letter in your issue of the 10th inst., headed "Intimidation at X.," and signed "Observer." Mr. A. B. was confident that no such intimidation as was suggested had ever occurred; but the charges made by "Observer" were so grave in their nature, and so detailed in their particulars, that he thought it best to have the matter thoroughly investigated by persons not resident in the locality. He, therefore, instructed us to make an exhaustive enquiry on the spot into the alleged practices. This we have done. We have personally examined everyone concerned in the management of the estate; and we have satisfied ourselves that the allegations of intimidation are entirely without foundation. They one and all absolutely and positively deny that there has ever been on their part any intimidation of any sort or kind.

We, therefore, on Mr. A. B.'s behalf, ask you in your next issue to withdraw absolutely and unreservedly the unfounded statements which you have circulated, and to express your regret that you have done his employés and himself so unjustifiable an injury. Further, we must ask you at the same time to publish this letter, giving to it the same publicity as was accorded to the letter written by "Observer."—We are, Sir, your obedient servants,

X. & Y.

II.—*Apology by an Editor.*

Intimidation at X.

We published in our issue of the 10th ult. a letter which was received from an anonymous correspondent signing himself "Observer," which reflected seriously upon the character of our respected neighbour, Mr. A. B., and on those who manage his estate. We are now satisfied that such charges are wholly unfounded, and we hereby withdraw and contradict them.

We beg to apologise to Mr. A. B. and to his employés for having printed and circulated such statements. We trust that these gentlemen will accept this apology in the spirit in which it is offered, and as the best amends which it is in our power to make for the annoyance which we have unintentionally given them.

III.—*Report of a Meeting.*

Mr. C. D. has written us a letter taking exception to a passage in the report which we published last Friday of the proceedings at the Annual General Meeting of the Coy., Ltd. The Chairman is therein represented as saying that—[Here set out the substance of the passage complained of.] Mr. C. D. strenuously denies the truth of this assertion, and goes so far as to say that the suggestion is a reflection upon his personal honour. Nothing, of course, was further from our intention than to make any such reflection. Our desire throughout these unhappy differences has been to maintain a merely journalistic and judicial attitude.

The report of the meeting was entrusted to two highly responsible members of our staff, whose duty and desire was to give a faithful record of the proceedings—no more and no less. We most gladly record Mr. C. D.'s repudiation of what he deems to be a personal charge. We assure him that we had no intention whatsoever of reflecting on his good faith and integrity. We feel, indeed, that such an assurance is superfluous. But if he has been caused the slightest unpleasantness we most sincerely regret the same, and, indeed, apologise for having seemed to be its vehicle.

IV.—*Town Councillors at War.*

Apology.

I admit that I am the author of, and that I caused to be published in the issue of the *Chronicle* for Oct. 28, 1905, a letter signed "One Who Knows." That letter contained statements quite unfounded and comments wholly unjustifiable on the public acts and private life of Mr. Councillor . For this I desire to apologise most fully and sincerely, and to express my great regret that I should have taken so unworthy a step.

Dated this day of 1905.

(*Signed*) E. F.

V.—*Apology Settled in Court by Counsel.*

Apology—Brown v. *Jones.*

To Mrs. Brown of .

I hereby apologise for and withdraw, without reservation, all statements made by me imputing to you impropriety and misconduct. I admit that there is no foundation in fact for any imputation upon your character, and regret that any should ever have been made. I agree to pay you £ to cover damages and costs incidental to the action. I consent to this apology being published in the *Journal* if you desire it.

(*Signed*) EDWARD JONES.
[*Defendant.*]

VI.—*Apology after Action Brought.*

Apology.

I unconditionally revoke and withdraw every imputation which I have cast upon the character of Miss of . I hereby apologise to her for my conduct, and I beg her to accept this withdrawal and apology as some slight amends for the cruel injury of which she so justly complains.

I hereby undertake to pay Miss such sum as will fully indemnify her against all the costs incurred by her in the action which she has commenced against me.

I consent to her publishing this apology in any manner which she may deem necessary to clear her character from my aspersions.

Dated this day of 1905.

(*Signed*) G. H.

VII.—*Apology in a Newspaper after Action Brought.*

Apology.

I, , of , desire to express my sincere regret that I incautiously repeated a statement made to me by one of my father's clerks concerning Mr. K., of . Such statement now proves to have been wholly unfounded, and I beg to withdraw and contradict the same, and to apologise to Mr. K. for having made it.

An action having been commenced against me by Mr. K. for slander, I have this day paid into Court the sum of 15 guineas, and I trust that Mr. K. will accept that sum, together with this apology, as the best amends it is in my power to make for the injury or annoyance which I have inadvertently caused him.

Dated this 25th day of October 1882.

(*Signed*) ———
[*Defendant.*]

Witness,
A. B.,
Solicitor.

[*The jury, at the trial, found the above apology sufficient.*]

Apothecary.—An apothecary prescribes, prepares and sells drugs, and also prepares and sells drugs prescribed by others (*Rose* v. *College of Physicians*, 1703, 5 Bro. P. C. 553; 2 E. R. 857; *Woodward* v. *Ball*, 1834, 6 Car. & P. 577). A qualified practitioner under the Medical Acts, who is not an apothecary, may only supply drugs "in respect of his practice" (Medical Act, 1886, s. 6; see *Leman* v. *Fletcher*, 1873, L. R. 8 Q. B. 319). A chemist may only supply drugs, he may not prescribe them (see CHEMIST; and *Apothecaries Company* v. *Greenough*, 1841, 1 Q. B. 799; 55 R. R. 429). The licence of the Society of Apothecaries, London, was, before the Medical Act, 1886, one of the lower qualifications for registration under the Medical Acts (Medical Act, 1858, s. 15), but for such registration, after the 1st of June 1887, the qualifying examination in medicine, surgery, and midwifery prescribed by the Medical Act, 1886 (see ss. 2 and 3), must be passed. The Society of Apothecaries, London, was incorporated by royal charter (15 James I.). Its privileges and duties are now regulated by the Apothecaries Act, 1815, and the Amendment Act, 1874. The Act of 1815 makes provision for the examination of and granting certificates to apothecaries and their assistants, imposes penalties on persons practising as apothecaries, or assistant-apothecaries, without being certificated (ss. 14, 17 and 20), and forbids any apothecary to recover any charges in a court of law, unless he prove that he had obtained a certificate (s. 21) at the time when he rendered the services, or supplied the drugs, for which the charges are claimed (*Leman* v. *Houseley*, 1874, L. R. 10 Q. B. 66). The prohibition of the Act is still in force (*Davies* v. *Makana*, 1885, 29 Ch. D. 596), except that by the Medical Act, 1886, s. 6, any medical practitioner, registered under the Medical Acts, is entitled to practise medicine, and recover in *respect of such practice* any charge in respect of medicaments, and any fees. An apothecary, who is himself duly licensed, cannot recover charges for medicines supplied by an unqualified assistant without consulting him (*Howarth* v. *Brearley*, 1887, 19 Q. B. D. 303). Only one penalty is recoverable from a licensed person for practising contrary to the Act, although he gives advice to several patients (*Apothecaries Company* v. *Jones*, [1893] 1 Q. B. 89).

The Amendment Act of 1874 repealed the provisions of the Act of 1815, which made the service of an apprenticeship necessary, and empowered the Society to strike off the list of its licentiates persons convicted of crime, or guilty of "infamous conduct in any professional respect."

Registered apothecaries are exempt from service on juries or inquests (Jury Act, 1870, s. 9, and sched.), or in parish offices or in the militia (Medical Act, 1858, s. 35).

A certificate of the qualification of an apothecary, purporting to be under the seal of the Society, is receivable in evidence without further proof (Lord Brougham's Act, 14 & 15 Vict. c. 99, s. 8; see also CHEMIST; MEDICINE; MEDICAL PRACTITIONER).

Apparent (and Continuous) Easements.—Apparent easements are those which are manifested by some apparent sign, as the easement of light which is manifested by a window, or a watercourse by the fact of a flowing stream; while non-apparent easements are such rights as support, or a right-of-way, if there is no track or mark from which its existence can be inferred. Con-

tinuous easements are those which are in continual exercise, though they may not be incessantly used, as support and light, while such a right as a right-of-way, which is only used from time to time, is not continuous.

The doctrine of implied grants, arising on division of property between two or more persons, has given rise to much litigation as to apparent and continuous easements; it being questioned whether an apparent and continuous mode of use of one part of a property, for the beneficial enjoyment of another part by the owner of both, becomes an easement appurtenant to the latter, if the owner divides them by sale or otherwise, and makes no express stipulations on the subject. The case in which the question was first raised was *Pyer* v. *Carter*, 1857, 1 H. & N. 916, relating to a drain which ran from one house under another, both houses having been one formerly, but having been converted into two and sold to different people. This was followed by a series of cases relating to easements of various kinds, in which different opinions prevailed, and considerable doubt arose as to what easements were to be regarded as apparent and continuous and what were not. [See Goddard on *Easements*, 6th ed., 1904, pp. 181, 193.]

Apparent Heir.—See HEIR.

Apparent Partners.—See PARTNERSHIP.

Apparent Possession.—See BILLS OF SALE.

Apparitor.—The word is now used to describe the officer of an Ecclesiastical Court. His duty is "to convene and cite defendants into Court, to introduce the process emitted by the judge, and to admonish or cite the parties in the production of witnesses and the like." In this capacity he serves all processes issuing out of an Ecclesiastical Court, and summons offenders and others to make their appearance therein. An apparitor is chosen by the ecclesiastical judge, and may be suspended by him; but may not be removed at discretion when he holds his office by patent. An apparitor holds his office at the pleasure of Parliament, and does not possess a vested interest in it (10 & 11 Vict. c. 98; 38 & 39 Vict. c. 76, s. 2). Canon 135 of the Canons of 1603 provides that an apparitor shall not exact more fees than in "those our constitutions formerly prescribed"; that is, such fees as were certified in 1597. Canon 138 limits the number of apparitors in any Court. If an apparitor's fees are withheld, he can recover them by an action at law, but not in an Ecclesiastical Court.

In addition to ecclesiastical penalties, an apparitor is liable to an action in a temporal Court for any act of falsehood in the execution of his office.

An apparitor is occasionally described as a summoner or sumner (21 Hen. VIII. c. 5, canon 138, *supra*); also as a beadle. Apparitors are so called "quia faciunt reos apparere in conspectu judicum."

[*Authorities.*—Ayliffe, *Parergon Juris Canonici*, pp. 67-71; Phillimore, *Ecclesiastical Law*, 2nd ed., vol. ii. pp. 951-954.]

Appeal of Felony was a criminal accusation of felony made by a private accuser, as distinguished from such accusation made by

indictment of a grand jury or coroner's inquisition. It was a survival of the primitive customs of private war, and was in certain events tried by battle. Appeals in cases not capital were early superseded by actions of tort; appeals of larceny fell out of use in consequence of the provisions of 21 Hen. VIII. c. 11 (now embodied in 24 & 25 Vict. c. 96, s. 100, and 56 & 57 Vict. c. 71, s. 24), as to the restitution to the true owner of the stolen property, on conviction of the offender on indictment (see *Bentley* v. *Vilmont*, 1886, 12 App. Cas. 471). The last appeal was *Ashford* v. *Thornton*, 1818, 1 Barn. & Ald. 405; 19 R. R. 349, in consequence of which appeals were abolished by 59 Geo. III. 46.

[The history of the subject may be traced in Pollock and Maitland, *Hist. Eng. Law*, ii. 464-5, 481; Hawk., P. C., bk. ii. c. 23; Stephen, *Hist. Crim. Law Eng.* i. 244-250; Neilson, *Trial by Combat*, 1890; Lea, *Superstition and Force* (2nd ed., 1878), part ii.; *Bigby* v. *Kennedys*, 1770, 5 Burr. 2643; O. W. Holmes, *Lectures on the Common Law*.]

Appeals.

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Preliminary Observations.—One chief defect in our legal procedure before the Judicature Acts was the want of simplicity and uniformity

in the system of appeal from the various Courts of First Instance. The condition of matters before 1873 cannot be better described than in the words of the Judicature Commissioners. In their First Report, dated 25th March 1869, they state as follows:—

"At present, the appeal from orders or decrees made by the Judges of First Instance in the Court of Chancery, is either to the Court of Appeal in Chancery, or to the House of Lords, at the option of the appellant; there is also an appeal to the House of Lords from the Court of Appeal in Chancery. Appeals and errors from the Courts of Queen's Bench, Common Pleas, and Exchequer, must in all cases go to the Court of Exchequer Chamber, from whence a further appeal, or error, as the case may be, lies to the House of Lords. From the Court of Probate, appeal also lies to the House of Lords. From the decrees and orders of the Judge Ordinary of the Divorce Court an appeal lies to the Full Court, consisting of the Judge Ordinary and two Common Law Judges; and also, in certain cases, from the Full Court, or from the Judge Ordinary exercising the powers of the Full Court, to the House of Lords. From the Court of Admiralty the sole appeal is to Your Majesty in Council, or, practically, to the Judicial Committee of the Privy Council."

In order to remedy a system so unsatisfactory and so wasteful of judicial strength, the Commissioners recommended that, as a part of the Supreme Court, a Court of Appeal should be established, to which an appeal should lie from all judgments, decrees, rules, and orders, in suits or proceedings not strictly criminal, of any division or judge of the Supreme Court, with certain exceptions specified by them, with a final right of appeal to the House of Lords.

It is not within the scope of the present article to refer further to methods of appeal which are obsolete, and have only an historical or antiquarian interest. The object is to pass in review the systems of appeal from the various Courts of First Instance which are now in force. Our survey covers so wide a field that it must necessarily be hasty and imperfect, and for fuller information the reader is referred to the text-books dealing more particularly with the various subjects touched upon.

1. Appeals to the Court of Appeal.

We have first to consider the Court of Appeal, one of the two permanent divisions of the Supreme Court of Judicature.

Creation of Court of Appeal.—Sec. 4 of the Judicature Act, 1873, 36 & 37 Vict. c. 66, provides that one of such divisions, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as may be incident to the determination of any appeal. The Court so created is referred to throughout the rules of the Supreme Court, and is familiarly known as the Court of Appeal. (See sec. 13 (2) of the Interpretation Act, 1899, 52 & 53 Vict. c. 63.)

Constitution of the Court.—The Court of Appeal consists of certain *ex officio* judges—viz., the Lord Chancellor, president (Jud. Act, 1875, ss. 4, 6); every person who has held the office of Lord Chancellor (Jud. Act, 1891, s. 1); the Lord Chief Justice of England (Jud. Act, 1875, s. 4); the Master of the Rolls (*ibid.*); the President of the Probate,

Divorce and Admiralty Division (Jud. Act, 1881, s. 4); and of five ordinary judges (Jud. Act, 1881, s. 3), with the title of "Lords Justices of Appeal" (Jud. Act, 1877, s. 4).

Jurisdiction of Court.—The Court of Appeal is a superior Court of record, and by sec. 18 of the Judicature Act, 1873, all jurisdiction and powers of the following Courts were transferred to it:—

(1) The Lord Chancellor and Court of Appeal in Chancery and Bankruptcy:
(2) The Court of Appeal in Chancery of the County Palatine of Lancaster, and of the Chancellor of the Duchy and County Palatine of Lancaster, when sitting alone or apart from the Lords Justices of Appeal in Chancery, as a judge of appeal from orders of the Court of Chancery of the County Palatine of Lancaster:
(3) The Court of the Lord Warden of the Stannaries:
(4) The Court of Exchequer Chamber:
(5) His Majesty in Council, or the Judicial Committee of the Privy Council on appeal from the High Court of Admiralty, or from any order in Lunacy.

It will be observed that this section did not transfer to the Court of Appeal the jurisdiction of the full Court established by the Matrimonial Causes Acts, 20 & 21 Vict. c. 85, s. 55; 21 & 22 Vict. c. 108, s. 18; and 23 & 24 Vict. c. 144, ss. 1, 2; but this omission was remedied by sec. 9 of the Judicature Act, 1891.

As to appeals in Admiralty matters, it must be noticed that in prize cases the right of appeal has not been transferred to the Court of Appeal. Though the High Court is a prize court within the meaning of the Naval Prize Act, 1864, 27 & 28 Vict. c. 25, and though all causes and matters within the jurisdiction of the High Court as a prize court are assigned to the Probate, Divorce and Admiralty Division, yet an appeal from the High Court, when acting as a prize court, lies only to His Majesty in Council, in accordance with the Naval Prize Act, 1864 (Jud. Act, 1891, s. 4).

Statutory Jurisdiction conferred on Court of Appeal.—In addition to the various jurisdictions transferred to the Court of Appeal by the 17th section of the Judicature Act, 1873, and by the 9th section of the Judicature Act, 1891, there are certain other statutory provisions conferring a right of appeal to the Court of Appeal, which must be enumerated.

1. *The Arbitration Act*, 1899.—Under this Act, 52 & 53 Vict. c. 49, s. 17, the Court of Appeal has all the powers conferred on the Court or a judge under the provisions of the Act relating to references under order of the Court. In this connection reference should be made to the important case of *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475, in which it was held by the full Court of Appeal—(1) that an appeal from the judgment of an official referee to whom an action has been referred for trial does not lie direct to the Court of Appeal, but in the Chancery Division to the judge to whom the action is assigned, and in the King's Bench Division to a Divisional Court; and (2) that sec. 1 (5) of the Judicature Act, 1894, does not apply to the case, which is governed by the provisions of R. S. C., 1883, Order 36, r. 52, and Order 40, r. 6, and that therefore an appeal lies from the decision of the judge or Divisional Court, as the case may be, without leave.

2. *The Agricultural Holdings Act*, 1900.—By sec. 2 (6) of this Act, 63 & 64 Vict. c. 50, an order of the County Court judge on a case stated by an arbitrator under the Act is final, unless either party appeals to the Court of Appeal within the time and under the conditions prescribed by rule; and from the decision of the Court of Appeal no appeal lies.

3. *Liverpool Court of Passage Act*, 1893.—Under this Act, 56 & 57 Vict. c. 37, s. 10, appeals from orders of the judge of the Liverpool Court of Passage lie to the Court of Appeal.

4. *Palatine Court of Durham Act*, 1889.—Under sec. 11 of this Act, 52 & 53 Vict. c. 47, the Court of Appeal has authority to hear and determine appeals from any judgment or order of the Chancellor of Durham, and the provisions of the Judicature Acts and of the rules of the Supreme Court apply to such appeals.

5. *Railway and Canal Traffic Act*, 1888.—Under sec. 17 (2) of this Act, 51 & 52 Vict. c. 25, an appeal lies to the Court of Appeal from a decision of the Railway and Canal Commissioners on a point of law.

6. *Workmen's Compensation Act*, 1897.—By sched. 2 (4) of this Act, 60 & 61 Vict. c. 37, an arbitrator appointed under the Act may submit any question of law for the decision of the County Court judge, whose decision is final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal. An appeal also lies, on a question of law, to the Court of Appeal from the decision of the County Court judge when he sits as arbitrator. (See further, WORKMEN'S COMPENSATION.)

New Trials.—Questions of Practice and Procedure.—Finally, the Judicature Act, 1890, s. 1, has transferred to the Court of Appeal jurisdiction to deal with motions for a new trial or to set aside a verdict where there has been a trial by jury; and in matters of practice and procedure, every appeal from a judge is to the Court of Appeal, by virtue of sec. 1 (4) of the Judicature Act, 1894.

Appeals from High Court.—The result of the transfer of appellate jurisdiction effected by sec. 18 of the Judicature Act, 1873, coupled with sec. 19 of the same Act, is to give a right of appeal to the Court of Appeal from every judgment or order of the High Court, or of any judge thereof, subject, however, to limitations imposed by statute or rule, which (*a*) confer appellate jurisdiction on Divisional Courts, and prescribe that the appeal from the original Court shall, in the first instance at any rate, lie to such Courts; or (*b*) restrict the right of appeal in particular cases. See and consider the judgments in *Cox* v. *Hakes*, 1890, 15 App. Cas. 506.

The subject of Divisional Courts will be dealt with hereafter.

Statutory Restrictions on Right of Appeal.—(1) Judgments of Divisional Courts, upon appeal from inferior Courts, are final, unless special leave to appeal to the Court of Appeal be given (Jud. Act, 1873, s. 45). And so, where there is a right of appeal to the High Court from any Court or person, the determination of a Divisional Court is final, unless leave to appeal be given (Jud. Act, 1894, s. 1 (5)).

(2) Where the jurisdiction of the Court below is final by statute, then no appeal lies from such Court to the Court of Appeal (Appellate Jurisdiction Act, 1876, s. 20). The section does not apply to a case where a statute provides that an appeal is to be final, unless leave be given to appeal, and such leave has been given under sec. 45 of the Act of 1873 (*Crush* v. *Turner*, 1878, 3 Ex. D. 303; *Thomas* v. *Kelly*,

1888, 13 App. Cas. 506; and cf. *Hall* v. *London, Brighton and South Coast Rly. Co.*, 1886, 17 Q. B. D. 230).

(3) No appeal lies from any decision of the Court of Crown Cases Reserved, nor from any judgment of the High Court in any criminal cause or matter, except for some error of law apparent on the record (Jud. Act, 1873, s. 47). The words "in any criminal cause or matter" should receive the widest interpretation. "The intention was that no appeal should lie in any criminal matter in the widest sense of the term, the Court being constituted for the purpose of hearing appeals in *civil* causes and matters" (*per* Lord Esher, *Ex parte Woodhall*, 1888, 20 Q. B. D. 832). The question is not whether the proceeding *must*, but whether it *may*, end in imprisonment (*Seaman* v. *Burley*, [1896] 2 Q. B. 347; and see *Att.-Gen.* v. *Kissane*, [1893] 2 I. R. 220). As to what are, and what are not, criminal causes or matters within the section, see the cases collected in the notes to the section in the *Annual Practice*, 1906.

(4) No appeal lies, except by leave, from any order made by consent, or as to costs only, which are by law left to the discretion of the Court (Jud. Act, 1873, s. 49). As to appeals for costs, see the notes in the *Annual Practice*, 1906, to Order 65, r. 1; Daniell, *Ch. Pr.*, 7th ed., pp. 1043-1048.

(5) No appeal lies, without leave, direct to the Court of Appeal from any order made at chambers (Jud. Act, 1873, s. 50). As to this, however, see Jud. Act, 1894, s. 1 (4).

(6) No appeal lies from an order allowing an extension of time for appealing from a judgment or order, nor, without leave, from any interlocutory order or judgment, except in the following cases:—

(i.) Where the liberty of the subject or the custody of infants is concerned:

(ii.) Granting or refusing an injunction or appointing a receiver:

(iii.) Any decision determining the claim of any creditor, or the liability of any contributory, or of any director or other officer under the Companies Acts, 1862 to 1890, in respect of misfeasance or otherwise:

(iv.) Any decree *nisi* in a matrimonial cause, and any judgment or order in an admiralty action determining liability:

(v.) Any order on a special case stated under the Arbitration Act, 1889:

(vi.) Such other cases, to be prescribed by Rules of Court, as may, in the opinion of the authority for making such rules, be of the nature of final decisions (Jud. Act, 1894, s. 1 (1) (*b*)).

(7) No appeal lies from an order of a judge giving unconditional leave to defend an action (*ibid.* s. 1 (*b*) (3)).

(8) No appeal from an order absolute for dissolution or nullity of marriage lies in favour of any party, who, having had time and opportunity to appeal from the decree *nisi*, has failed to appeal therefrom (Jud. Act, 1881, s. 10).

(9) The decision of the High Court on questions of law in registration and election cases is final, unless special leave to appeal is given (Jud. Act, 1881, s. 14).

Non-Statutory Restrictions.—In addition to the statutory restrictions on the right of appeal, there are other limitations on the right imposed by the ordinary course and practice of the Court.

Undertaking Not to Appeal.—Thus the Court of Appeal will refuse to entertain an appeal where an undertaking not to appeal has been embodied in an order (*In re Hull and County Bank*, 1879, 13 Ch. D. 261).

Where Jurisdiction is merely Consultative.—Nor will the Court allow an appeal to be raised from a decision of the High Court, where its jurisdiction is consultative and not judicial (*Ex parte Kent County Council*, [1891] 1 Q. B. 725; *In re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613; *In re Kirkleatham Local Board and Stockton Water Board*, [1893] 1 Q. B. 375); or where the proceedings are *extra cursum curiæ*, as where a special case raises for decision questions of fact (*Burgess* v. *Morton*, [1896] A. C. 136).

Discretionary Orders.—Though discretionary orders are appealable, yet the Court of Appeal is very slow to interfere with the discretion exercised by the judge below, unless such discretion was exercised on a wrong principle. *Golding* v. *Wharton Salt Works Co.*, 1876, 1 Q. B. D. 374; *Watson* v. *Rodwell*, 1876, 3 Ch. D. 380, sufficiently illustrate this principle; numerous other cases will be found cited in the books of practice.

Original Jurisdiction of Court of Appeal.—For the purposes of, and incidental to, its appellate jurisdiction, and for the purpose of every authority given to it by the Act of 1873, the Court of Appeal has all the power, authority and jurisdiction of the High Court (Jud. Act, 1873, s. 19). See *Cox* v. *Hakes*, 1890, 15 App. Cas. 506.

By sec. 24 of the Act of 1873, the Court of Appeal is to administer law and equity according to the rules stated in that section.

The right to have issues submitted to trial by jury may be enforced by motion in the Court of Appeal (Jud. Act, 1875, s. 22).

Leave to appeal may be given by the Court of Appeal as well as by the judge below (Jud. Act, 1894, s. 1 (1) (*b*) and (5)).

The Court of Appeal has no jurisdiction to hear an original petition (*In re Dunraven Adare Coal and Iron Co.*, 1875, 24 W. R. 37; *Brown* v. *Collins*, 1883, 25 Ch. D. 56). It has jurisdiction to entertain an application against a solicitor for misconduct, though not brought by way of appeal (*In re Whitehead*, 1885, 28 Ch. D. 614).

Rehearing.—The Judicature Commissioners recommended that every appeal should be deemed to be in the nature of a rehearing, and that there should be no rehearing of any cause or matter before the Court by which it was originally heard, except by leave of the Court (*First Report*, pp. 24, 25). In accordance with these recommendations every appeal is by way of rehearing (Order 58, r. 1); and the power of rehearing by a judge of an order made by himself or any other judge is abolished, the power to rehear being part of the appellate jurisdiction transferred to the Court of Appeal (*In re St. Nazaire Co.*, 1879, 12 Ch. D. 88). After an order has been passed and entered, if it accurately expresses the intention of the Court, there is no power to rehear or alter it (*Preston Banking Co.* v. *Allsopp*, [1895] 1 Ch. 141; *In re Suffield & Watts; Ex parte Brown*, 1888, 20 Q. B. D. 693); though, so long as an action is not perfected, the Court can rehear it (*In re Suffield & Watts* (*ubi sup.*); *In re Crown Bank*, 1890, 44 Ch. D. 634).

Since the Act of 1873 the High Court has no jurisdiction to review its own order in an action brought to review the order on the ground of error on the face of it, the remedy being by appeal to the Court of Appeal (*Charles Bright & Co., Ltd.*, v. *Sellar*, [1904] 1 K. B. 6).

Procedure on Appeals :—

Sittings of Court.—The Court of Appeal usually sits in two Divisions (Jud. Act, 1875, s. 12), one Court dealing with appeals from the King's Bench and Probate, Divorce and Admiralty Divisions, the other Court taking appeals from the Chancery Division and in Bankruptcy. Under sec. 1 of the Judicature Act, 1902, the Court is empowered to sit in three Divisions.

Number of Judges.—Where the appeal is from a final order, decree, or judgment, it is heard before not less than three judges, and where it is from an interlocutory order, decree or judgment, before not less than two judges—the Court of Appeal being the authority to determine any doubt as to what orders are final and what interlocutory (Jud. Act, 1875, s. 12). This provision, however, has been qualified by sec. 1 of the Judicature Act, 1899, enabling two judges to hear appeals, with the consent of the parties.

Power of a Single Judge.—Directions incidental to a cause or matter under appeal may be given by a single judge of the Court of Appeal, subject to discharge or variation by the Court of Appeal (Jud. Act, 1873, s. 52). A motion to discharge such an order is not within sec. 1 (1) (*b*) of the Judicature Act, 1894, and can be made without leave (*Boyd* v. *Bischoffsheim*, [1895] 1 Ch. 1).

Who may Appeal.—Any person, a party to the action, or served with or bound by the judgment, may appeal from it (Seton, p. 860), the present practice in this respect not differing from that which prevailed before the Judicature Acts (*Ellison* v. *Thomas*, 1862, 1 De G., J. & S. 18; 46 E. R. 7; *Jopp* v. *Wood*, 1864, 33 Beav. 372; 55 E. R. 411; *Bruff* v. *Cobbold*, 1872, L. R. 7 Ch. 217). One of several plaintiffs can appeal without his co-plaintiffs (*Beckett* v. *Attwood*, 1881, 18 Ch. D. 54); or against his co-plaintiffs (*Jopp* v. *Wood*, 1865, 2 De G., J. & S. 323; 46 E. R. 400). Persons not parties to the record may appeal by leave obtained *ex parte* from the Court of Appeal (*In re Markham; Markham* v. *Markham*, 1880, 16 Ch. D. 1; *In re Securities Insurance Co.*, [1894] 2 Ch. 410). The true test to be applied in considering whether leave should be given is this: Is the interest of the party seeking to appeal such that he might have been made a party? (*Crawcour* v. *Salter*, 1882, 30 W. R. 329; *In re Youngs; Doggett* v. *Revett*, 1885, 30 Ch. D. 421). [See further, Dan. *Ch. Pr.*, 1041, 1042; Seton, 860, 861.]

Appeals, how Brought.—Notice of Appeal.—Every appeal to the Court of Appeal is now by way of rehearing, and is brought by notice of motion in a summary way, thus substituting one uniform method for the various modes which obtained under the old practice, according to the nature of the order appealed from. The appeal may be from the whole or any part of a judgment or order, and the notice of motion must state whether the whole or part only of the judgment or order is complained of, and if from part only must specify such part (Order 58, r. 1).

As to what is a sufficient notice of appeal, see *In re New Callao*, 1882, 22 Ch. D. 484; *In re Blyth & Young*, 1880, 13 Ch. D. 416; *Kettlewell* v. *Watson*, 1883, 52 L. J. Ch. 818.

A notice of appeal may be withdrawn with the consent of the respondent, but in that event the appellant cannot revoke the withdrawal, but must apply to the Court of Appeal for leave to give a fresh notice (*Watson* v. *Cave* (No. 2), 1881, 17 Ch. D. 23).

Service of Notice of Appeal.—Notice of appeal need only be served on parties directly affected by the appeal, but the Court may require other parties to be served if necessary (Order 58, r. 2). See *Hunter* v. *Hunter*, 1876, 24 W. R. 504; *Purnell* v. *Great Western Rly. Co.*, 1876, 24 W. R. 720.

A person brought in by a third-party notice is not a party directly affected by an appeal brought by the plaintiff (*In re Salmon; Priest* v. *Uppleby*, 1889, 42 Ch. D. 351). See, too, as to the meaning of the expression "directly affected," *In re a Debtor*, [1901] 2 K. B. 354.

As to the appearance *gratis* of a party not served though interested, see *In re New Callao*, 1882, 22 Ch. D. 484.

Service on the solicitor on the record of the party is good service, even though he has ceased to act (*Pole* v. *Dick*, 1885, 29 Ch. D. 351). In a proper case substituted service of the notice may be ordered (*Ex parte Warburg*; *In re Whalley*, 1883, 24 Ch. D. 364).

Amendment of Notice.—Any notice of appeal may be amended at any time by the Court of Appeal (Order 58, r. 2). It seems that special circumstances are not necessary (*In re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. 335; and see *In re Crosley; Munns* v. *Burn*, 1887, 34 Ch. D. 664).

Length of Notice.—Notice of appeal from any judgment, whether final or interlocutory, or from a final order, is a fourteen days' notice, and from an interlocutory order is a four days' notice (Order 58, r. 3). The days mentioned in this rule are reckoned exclusively of the first day, and inclusively of the last day (Order 64, r. 12). Notice given for a day not during the sittings is good (*In re Coulton; Hamling* v. *Elliott*, 1886, 34 Ch. D. 22).

Final or Interlocutory.—The distinction between final and interlocutory judgments and orders is of great importance, for not only does the length of notice to be given, as provided by Rule 3, depend upon the nature in this respect of the order appealed from, but the same consideration affects also the time for appealing (r. 15); the admissibility of further evidence (r. 4); and the number of judges competent to hear the appeal (Jud. Act, 1875, s. 12). Accordingly, there have been a great number of decisions as to what orders are final and what interlocutory. For these the reader is referred to the various books of practice. Here it must suffice to state that the true test is whether the order finally decides the rights of the parties. If it does so decide, it is final, and fourteen days' notice must be given (*In re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. 349; *Standard Discount Co.* v. *La Grange*, 1877, 3 C. P. D. 67; *Blakey* v. *Latham*, 1889, 43 Ch. D. 23; *Bozson* v. *Altrincham Urban District Council*, [1903] 1 K. B. 547).

A judgment may be final, under Rules 3 and 4, as to length of notice and admissibility of evidence, but interlocutory as to the time for appealing. See *In re Compton; Norton* v. *Compton*, 1884, 27 Ch. D. 392; *In re Crosley; Munns* v. *Burn*, 1887, 34 Ch. D. 664.

Times for Appealing.—The times within which an appeal can be brought vary according to the nature of the judgment or order appealed from, and are governed by the provisions of Rules 9 and 15 of Order 58. By the first of such rules the time for appealing from any order or decision made or given in the matter of the winding-up of a company, or any order or decision in the matter of any bankruptcy, or in any other matter not being an action, is the same as the time limited for an appeal from

an interlocutory order under Rule 15. The last-named rule provides that no appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of *fourteen* days, and no other appeal after the expiration of *three months.*

The respective times above-mentioned are calculated, in the case of an appeal from an order in chambers, from the time when such an order was pronounced, or when the appellant first had notice of it, and in all other cases, from the time at which the judgment or order was signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal.

Winding-Up.—Rule 9 applies to an appeal from a winding-up order (*In re National Funds Assurance Co.*, 1876, 4 Ch. D. 305).

Bankruptcy.—[See *Bankruptcy Appeals, infra*, p. 386.]

"*Any other Matter not being an Action.*"—These words have been the subject of judicial decision in several cases (see *e.g. In re Bailie*, 1877, 4 Ch. D. 785; *In re Blyth & Young*, 1880, 13 Ch. D. 416). In those and similar cases it was held that they were decisions given in matters not being actions, the principle being that they were decisions given under various statutes providing for a particular mode of procedure independent of the Judicature Acts and rules thereunder. An originating summons, however, issued under Order 55, r. 3, is an action according to the definition in the Judicature Act, 1873, s. 100. Accordingly, an order made on such a summons is not an order made in a matter not being an action (*In re Fawsitt; Galland* v. *Burton*, 1885, 30 Ch. D. 231; *In re Vardon's Trusts*, 1885, 55 L. J. Ch. 259). [See *Annual Practice*, 1906, note to Order 58, r. 9.] The present definition of an originating summons (Order 71, r. 1A) has not, it is conceived, made any difference in this respect.

Refusal of an Application.—For the reason for the distinction as to the time of appealing between a completed order and a refusal, see *International Financial Society* v. *City of Moscow Gas Co.*, 1877, 7 Ch. D. p. 244; *Swindell* v. *Birmingham Syndicate*, 1876, 3 Ch. D. p. 133; *Berdau* v. *Small Arms Co.*, 1877, 7 Ch. D. 24.

Appeal from Order on Further Consideration, etc.—The time for appealing against an order made on further consideration, and on the hearing of a summons to vary the certificate on which such order is made, is the same as the time for appealing against the order on further consideration (Order 58, r. 15A). An order on further consideration is a final order (*Cummins* v. *Heron*, 1877, 4 Ch. D. 787; but see *In re Johnson; Manchester and Liverpool Banking Co.* v. *Beales*, 1889, 42 Ch. D. 505); and therefore the time for appealing is three months. The rule applies where the summons to vary and further consideration are heard together, though a separate order is made on each application (*Marsland* v. *Hole*, 1888, 40 Ch. D. 110).

Appeal from Refusal of Ex parte Application.—Where an *ex parte* application has been refused by the Court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of the refusal, or within such enlarged time as a judge of the Court below or of the Court of Appeal may allow (Order 58, r. 10).

The following Table shows at a glance the difference in the times applicable to various kinds of orders, both as to length of

notice of appeal and the time within which an appeal must be brought:—

Description.	Time within which Appeal must be brought.	Length of Notice.
Final judgment	3 months (Order 58, r. 15)	14 days (Order 58, r. 3)
Final order in an action .	3 months (Order 58, r. 15)	14 days (Order 58, r. 3)
Final order in a matter not being an action . .	14 days (Order 58, r. 15)	14 days (Order 58, r. 3)
Interlocutory order . . .	14 days (Order 58, r. 15)	4 days (Order 58, r. 3)
Order or decision in winding-up or bankruptcy, or in any other matter not being an action . . .	14 days (Order 58, rr. 9, 15)	14 days, if final; 4 days, if interlocutory (Order 58, r. 3)
Interlocutory judgment .	14 days (Order 58, r. 15)	4 days (Order 58, r. 3)
Order on further consideration and summons to vary	Same time as time for appealing against order on further consideration (Order 58, r. 15A), *i.e.* 3 months	14 days (Order 58, r. 3)
Ex parte application . .	4 days (Order 58, r. 10)	

An appeal is "brought" when the notice of appeal is served. The service of the notice is the critical step (*Christopher* v. *Croll*, 1885, 16 Q. B. D. 66; *Ex parte Viney, In re Gilbert*, 1877, 4 Ch. D. 794; *Ex parte Saffery, In re Lambert*, 1877, 5 Ch. D. 365).

Enlarging Time for Appeal.—Leave can only be granted by the Court of Appeal (*Bright* v. *Sellar*, 1904, 20 T. L. R. 586). Formerly very special circumstances were required to be shown to induce the Court to grant an extension of time (*Collins* v. *Vestry of Paddington*, 1880, 5 Q. B. D. 368), but the Court has a very wide discretion, and is bound to give leave if justice requires that leave should be given (*In re Manchester Economic Building Society*, 1883, 24 Ch. D. 497, *per* Brett, M.R.).

Setting down the Appeal.—The appeal must be entered before the day mentioned in the notice of appeal for the hearing. If this is not done it may be dismissed as abandoned (*In re Mansel; Rhodes* v. *Jenkins*, 1878, 7 Ch. D. 711).

On setting down an appeal, the appellant must produce to the proper officer the judgment or order, or an office copy, and must leave a copy of the notice of appeal to be filed. The appeal will then be set down by being entered in the list, and will come on for hearing in due course (Order 58, r. 8). In addition to the documents mentioned in the rule, the following papers must be left for the use of the judges at least one week before the appeal is likely to appear in the paper, viz., three copies of the notice of appeal of the judgment or order appealed from, and of the pleadings or other documents showing the nature of the appeal (Memorandum, Nov. 21, 1881). Failure to comply with this requirement will be visited with costs (*Cannot* v. *Oppenheim*, 1889, 38 W. R. 1). The costs of copies of material documents will be allowed on taxation (*In re Randell; Hood* v. *Randell*, 1887, 56 L. T. 8; *Stephens* v. *Lydall*, 1898, 15 T. L. R. 15).

Security for Costs of Appeal.—Such deposit, or other security for the costs to be occasioned by any appeal, is to be made or given as may be

directed under special circumstances by the Court of Appeal (Order 58, r. 15).

Under the old practice of the Court of Chancery, a deposit of £20 had to be made by the appellant in all cases (Consolidated Orders, 31, r. 4). Under the present rule security is no longer required as a matter of course.

Security for costs is required in bankruptcy appeals (Bankruptcy Rules, r. 131); and will be ordered in a proper case in appeals under the Workmen's Compensation Act (*Shea* v. *Drolenvaux*, 1903, 88 L. T. 679); and an application for a new trial (*Wightwick* v. *Pope*, [1902] 2 K. B. 99).

The application for security is made by original motion to the Court of Appeal (*Grills* v. *Dillon*, 1876, 2 Ch. D. 325). For form of notice of motion, see Dan. *Ch. Forms*, p. 734; Chitty's *Forms*, p. 490. The application should be made promptly (*Pooley's Trustee* v. *Whetham*, 1886, 33 Ch. D. 76).

What are Special Circumstances.—It has been established by many cases that the poverty of an appellant is a sufficient special circumstance within the rule (see *e.g. Harlock* v. *Ashberry*, 1881, 19 Ch. D. 84); but other circumstances arising from the nature of the appeal (*Weldon* v. *Maples*, 1887, 20 Q. B. D. 331; *Waddell* v. *Blockey*, 1878, 10 Ch. D. 416; *In re Ivory; Hankin* v. *Turner*, 1878, 10 Ch. D. 372; *Usil* v. *Brearley*, 1878, 3 C. P. D. 206); or from the fact that the appellant is a foreigner domiciled abroad with no assets in this country (*Grant* v. *Banque Franco-Egyptienne*, 1877, 2 C. P. D. 430); or is out of the jurisdiction without available assets in England (*In re Indian, &c., Mining Co.*, 1882, 22 Ch. D. 83), are sufficient to induce the Court to order security.

Where the right to security is clear, application should be made by the respondent to the appellant, who ought to offer to give security, and such offer ought, if reasonable, to be accepted so as to save unnecessary application to the Court (*The Constantine*, 1879, 4 P. D. 156). The Court of Appeal have recently (1905) given directions to the registrars to make this practice general.

Where security is ordered, the form of order should provide for the bond to be given to the satisfaction of the judge at chambers in case the parties differ (*Hope* v. *Hope*, 1902, 86 L. T. 363).

The proper practice is to limit the time for giving security to fourteen days, unless otherwise ordered, and that in default of the appellant giving the security within the time limited, the appeal should stand dismissed without further order, and that the appellant should pay the respondents' costs occasioned by the appeal, to be taxed by the taxing-master (Notice of C. A., Feb. 26, 1904).

Where the security ordered does not exceed £20, the amount must be deposited in Court; if the amount is larger, the appellant has the option of giving security (Seton, p. 875). [See further, SECURITY FOR COSTS.]

Evidence on Appeals.—Where any question of fact is involved in an appeal, the evidence used in the Court below is brought before the Court of Appeal, (*a*) in cases where the evidence was taken by affidavit, by production of printed copies of such affidavits as have been printed, and office copies of such as have not been printed; and (*b*) as to evidence given orally, by production of a copy of the judge's notes, or such other materials as the Court may deem expedient (Order 58, r. 11).

The Court below or the Court of Appeal may order evidence not presented in the Court below to be printed for the purposes of an appeal. A party printing without such order will have to bear the costs of so doing unless the Court otherwise orders (Order 58, r. 12).

Shorthand Notes.—The costs of shorthand notes of the summing-up by the judge below (*Pilling* v. *Joint Stock Institute*, 1896, 73 L. T. 570), and of the judgment (*In re De Falbe; Ward* v. *Taylor*, [1901] 1 Ch. 542), are allowed without special order; *secus* as to shorthand notes of evidence in the Court below, the costs of which will only be allowed under special circumstances (*Kelly* v. *Byles*, 1879, 13 Ch. D. 682; *Castner Kellner Alkali Co.* v. *Commercial Development Corporation*, [1899] 1 Ch. 803). Application for the allowance should as a rule be made at the hearing, and a special direction inserted in the order (*Earl de la Warr* v. *Miles*, 1881, 19 Ch. D. 80). In ordinary cases the judge's notes, supplemented by the notes of counsel, are sufficient (*per* Jessel, M.R., *Earl de la Warr* v. *Miles, ubi sup.*, p. 82).

If, upon the hearing, a question arises as to the ruling or direction of the judge to a jury or assessors, the Court is to have regard to verified notes or other evidence, and to such other materials as the Court may deem expedient (Order 58, r. 13).

Further Evidence.—The Court of Appeal has full discretionary power to receive further evidence on questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner. Further evidence may be given without leave, on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, further evidence (except as to matters subsequent to the judgment) will be admitted on special grounds only, and not without special leave of the Court (Order 58, r. 4).

Further evidence means any evidence whatever not used at the hearing in the Court below (*In re Chennell; Jones* v. *Chennell*, 1878, 8 Ch. D. 492).

As to the special grounds on which further evidence will be admitted, see *In re Chennell; Jones* v. *Chennell, ubi sup.; Bigsby* v. *Dickinson*, 1876, 4 Ch. D. 373; *Sanders* v. *Sanders*, 1881, 19 Ch. D. 373; *Pooley's Trustee* v. *Whetham*, 1884, 28 Ch. D. 38; *Evans* v. *Benyon*, 1887, 37 Ch. D. 329; *Ex parte Carnforth Hæmatite Iron Co.*, 1876, 4 Ch. D. p. 115; *In re West Jewell Tin Mining Co.; Weston's Case*, 1879, 10 Ch. D. 579.

Where the further evidence is documentary, notice should be given to the other side of the intention of the party desirous to adduce it to apply at the hearing (*Justice* v. *Mersey Steel and Iron Co.*, 1876, 24 W. R. 199); but where it is proposed to examine fresh witnesses, leave must be obtained by motion before the hearing (*Dicks* v. *Brooks*, 1880, 13 Ch. D. 652). For form of notice of motion, see Dan. *Ch. Forms*, p. 737.

Powers of the Court of Appeal.—The Court of Appeal has all the powers and duties as to amendment or otherwise of the High Court. It can draw inferences of fact, and give any judgment and make any order which ought to have been made, and make such further or other order as the case may require (Order 58, r. 4). It may order a verdict or judgment to be set aside, and a new trial to be had (r. 5). The

powers of the Court may be exercised, notwithstanding that the notice of appeal may be that part only of the decision, may be reversed or varied, and may be exercised in favour of all or any of the respondents or parties, although they may not have appealed from or complained of the decision (r. 4).

Amendment.—The power of the Court of Appeal to allow amendments will be exercised with great care (*Shoe Machinery Co.* v. *Cutlan*, [1896] 1 Ch. 108). An amendment will not be allowed which will have the effect of allowing an appellant to raise on appeal a case inconsistent with his original case (*Cropper* v. *Smith*, 1884, 26 Ch. D. 700; *Hipgrave* v. *Case*, 1885, 28 Ch. D. 356; *Ex parte Reddish, In re Walton*, 1877, 5 Ch. D. 883). Where third parties who had been brought in by a third-party notice under Order 16, r. 48, appeared on an appeal, and plaintiff succeeded against the defendants, leave to amend by asking for relief against the third parties, which had not been asked for at the trial, was refused (*Edison and Swan United Electric Light Co.* v. *Hilland*, 1889, 41 Ch. D. 28).

Power to draw Inferences of Fact, etc.—The intention of the rule was that the Court of Appeal should exercise its jurisdiction, so as to make the order which ought to be made at the time when the case is before it (*Quilter* v. *Maplesen*, 1882, 9 Q. B. D. 672). So, the Court can direct final judgment to be entered, although only an interlocutory judgment had been given by the Court below (*Miller* v. *Pilling*, 1882, 9 Q. B. D. 736); and where no notice of cross appeal had been given, the Court of Appeal varied the judgment in favour of the respondents upon an appeal against the whole judgment (*Att.-Gen.* v. *Simpson*, [1901] 2 Ch. 671).

As to the principles which govern the Court on the hearing of an appeal from a judge without a jury, see *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704. In such case the Court must act on its own considered conclusions on questions of fact as well as of law (*S. C.*); though the presumption is that the decision of the Court below was right, and that presumption must be displaced by the appellant; if the case is left in doubt, it is clearly not the duty of the Court to disturb the decision of the Court below (*Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q. B. D. 38).

Cross Appeals.—Cross appeals to the Court of Appeal are regulated by the provisions of Order 58, rr. 6, 7.

It is not necessary for a respondent to give notice of motion by way of cross appeal, but if he intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he must within the prescribed time give notice of such intention to any party who may be affected by such intention (r. 6).

Notice in the case of an appeal from a final judgment is an eight-days' notice, and in the case of an appeal from an interlocutory order a two-days' notice (r. 7).

The time for giving notice is not governed by Rule 15 (*Ex parte Bishop, In re Fox, Walker & Co.*, 1880, 15 Ch. D. 400), but solely by Rule 7. It is sufficient if the prescribed time expires before the case is heard; it need not expire before the case comes into the paper (*Jaeger's Sanitary Woollen System Co.* v. *Walker*, 1897, 41 Sol. Jo. 695). In computing the time here prescribed, the day on which the notice is served is excluded, and the eight (or two) subsequent days must expire not later than the day before the hearing (see TIME, COMPUTATION OF).

The notice prescribed by Rule 6 cannot be given by a respondent who desires to have an order varied on a point in which the appellant has no interest. In such case a formal notice of appeal must be given (*In re Cavander's Trusts*, 1881, 16 Ch. D. 270). Where an action and counter-claim are founded on separate and distinct causes of action, a cross notice under Rule 6 must be confined to the subject-matter of the claim or counter-claim, in respect of which notice of appeal has been given. If a respondent to an appeal on the counter-claim desires to appeal on the claim, he should give notice of appeal, and not a cross notice under Rule 6 (*National Society for Distribution of Electricity* v. *Gibbs*, [1900] 2 Ch. 280).

A respondent may give notice to a co-respondent that, on the hearing of the appeal, he will ask for a variation of a part of the judgment or order appealed from, which has been given in favour of the co-respondent (*Ex parte Payne, In re Cross*, 1879, 11 Ch. D. 539).

When a notice of cross appeal has been given by a respondent to the appeal, the appellant cannot by withdrawing his appeal prevent the party giving the notice of cross appeal from having his point argued (*In re Cavander's Trusts*, 1881, 16 Ch. D. 270). If the respondent elects to proceed, the appellant may give notice that, on the hearing of the respondent's appeal, he will bring forward his original contention (*The Beeswing*, 1884, 10 P. D. 18). And where the plaintiff appealed, and the defendant served a cross notice under Rule 6, it was held that the judgment could be varied in favour of the plaintiff on a point not mentioned in his notice of appeal (*Cracknall* v. *Janson*, 1879, 11 Ch. D. 1).

Costs of Cross Appeals.—If a respondent who gives notice of a cross appeal fails on such cross appeal, he will be ordered to pay to the original appellant such costs (if any) as were occasioned by his cross appeal, and those costs will be set off against any costs payable to him by the original appellant (*How* v. *Winterton*, [1896] 2 Ch., at p. 641). And where both the original appeal and the cross appeal are dismissed, the original appellant will be ordered to pay the costs of the appeal, deducting such as have been occasioned by the cross appeal (*The Lauretta*, 1879, 4 P. D. 25).

The costs will in a proper case be apportioned (*Harrison* v. *Cornwall Mineral Rys. Co.*, 1881, 18 Ch. D. 400); but not where they have not been materially increased by the cross notice (*Robinson* v. *Drakes*, 1883, 23 Ch. D. 98). See further, as to costs, *Cracknall* v. *Janson*, 1879, 11 Ch. D. 1; *Johnstone* v. *Cox*, 1881, 19 Ch. D. 17.

[See further, as to cross appeals, Dan. *Ch. Pr.*, 7th ed., 1061; Dan. *Ch. Forms*, 5th ed., p. 735; Seton, 6th ed., pp. 872, 873; Chitty, *Archbold*, 14th ed., pp. 980, 981; *The Annual Practice*, notes under Order 58, rr. 6, 7.]

Costs of Appeals.—The Court of Appeal has power to make such order as to the whole or any part of the costs of the appeal as may be just (Order 58, r. 4).

As a rule, costs in the Court of Appeal follow the event, contrary to the old rule of the Court of Chancery, that a successful appellant was not entitled to costs (*Memorandum of Judges*, 1876, 1 Ch. D. 41; *Olivant* v. *Wright*, 1875, 45 L. J. Ch. 1; *The City of Berlin*, 1877, 2 P. D. 187; *The Batavier*, 1889, 15 P. D. 37).

There is, however, full discretion in the Court as to costs (Order 65, r. 1; Jud. Act, 1890, s. 5); and in a proper case a successful appellant

may be deprived of his costs (see *e.g. Ex parte Cooper, In re Barnard*, 1879, 10 Ch. D. 313; *Hussey* v. *Horne Payne*, 1878, 8 Ch. D. 670; *Chard* v. *Jervis*, 1882, 9 Q. B. D. 178; *Elliot* v. *Lord Rokeby*, 1882, 7 App. Cas. 43); and costs can be refused to a successful respondent where his conduct is such as to lead to an appeal (*Paterson* v. *Provost of St. Andrews*, 1881, 6 App. Cas. 833); or where a respondent allows an appellant to incur costs without warning him of a preliminary objection which he intends to take on the hearing (*In re Blyth & Young*, 1880, 13 Ch. D. 416; *In re Speight, Ex parte Brooks*, 1883, 13 Q. B. D. 42; but see *contra, Ex parte Shead, In re Munday*, 1884, 15 Q. B. D. 338). [See further, as to costs, Morgan and Wurtzburg on *Costs*, 2nd ed., 1882, pp. 144-149; Dan. *Ch. Pr.*, 7th ed., pp. 1077-1081; Seton, 6th ed., pp. 872, 873; *The Annual Practice*, 1906, pp. 804-807; and COSTS.]

Stay of Proceedings pending Appeal.—An appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any judge thereof, or the Court of Appeal may order (Order 58, r. 16).

An application for a stay pending appeal must be made in the first instance to the Court below, according to the provisions of Rule 17, under which any application, which may be made either to the Court below or to the Court of Appeal, must be made in the first instance to the Court below. The Court of Appeal, however, has concurrent jurisdiction, and, if the application to the Court below is refused, it may be renewed before the Court of Appeal, and will be treated, not as an appeal, but as an original application. It must be made within a reasonable time (*Cropper* v. *Smith*, 1883, 24 Ch. D. 305).

In the Chancery Division the application to stay is made either at the time of the trial, or subsequently by motion to the judge who tried the action.

In the King's Bench Division it is made to the judge who tried or heard the case, though the order can be made, even after trial, by a master at chambers (*Oppert* v. *Beaumont*, 1887, 18 Q. B. D. 435).

Special grounds for granting a stay must be shown (*The Annot Lyle*, 1886, 11 P. D. 114; *Barker* v. *Lavery*, 1885, 14 Q. B. D. 769; *Tuck* v. *Southern Counties Deposit Bank*, 1889, 42 Ch. D. 478). It requires special circumstances to induce the Court of Appeal to grant a stay pending a motion for a new trial, where a stay has been refused by the judge at the trial (*Monk* v. *Bartram*, [1891] 1 Q. B. 346).

As to stay of proceedings where otherwise irreparable injury would be caused, see *Story* v. *Lord Lennox*, 1836, 1 My. & Cr. 685; 40 E. R. 59; *Walburn* v. *Ingilby*, 1833, 1 My. & K. p. 84; 39 E. R. 613; *Penn* v. *Bibby*, 1866, L. R. 3 Eq. 308. As a rule, such proceedings will be stayed as would render a successful appeal nugatory (*Wilson* v. *Church*, 1879, 12 Ch. D. 454; *Polini* v. *Gray, ibid.* 438).

It is unusual to grant a stay of inquiries directed by a judgment pending an appeal, and special circumstances must be shown (*Shaw* v. *Holland*, [1900] 2 Ch. 305).

Where by the order appealed from the appellant is under liability to pay costs to the respondent, such costs have in many cases been ordered to be paid on the personal undertaking of the solicitor to the respondent to refund if the appeal succeeds (*Grant* v. *Banque Franco-Egyptienne*, 1878, 3 C. P. D. 202; *Morgan* v. *Elford*, 1876, 4 Ch. 352;

Merry v. *Nickalls*, 1873, L. R. 8 Ch. 205). Sometimes a stay has been granted on the terms of the amount of the costs below being paid into Court (*Cooper* v. *Cooper*, 1876, 2 Ch. D. 492). There is, however, no hard-and-fast rule; the matter is one entirely in the discretion of the Court (*Att.-Gen.* v. *Emerson*, 1889, 24 Q. B. D. 56).

The costs of an application for stay of proceedings are usually directed to be paid by the applicant (*Cooper* v. *Cooper*, 1876, 2 Ch. D. 492); though the Court has a discretion in the matter (*Adair* v. *Young*, 1879, 11 Ch. D. 136).

Interest.—Interest will be allowed for such time as execution has been delayed by reason of an appeal, and the taxing officer may compute such interest without any order for the purpose (Order 58, r. 19).

Where a judgment for unliquidated damages is set aside by the Court of Appeal and another judgment ordered to be entered in its place, the ordinary practice is to date the second judgment as of the date of the order of the Court of Appeal, from which date interest runs upon damages recovered (*Borthwick* v. *Elderslie Steamship Co.*, [1905] 2 K. B. 156).

Having thus passed in review the proceedings on an appeal to the Court of Appeal generally, it is necessary to call attention to some appeals to which special provisions apply.

Bankruptcy Appeals.—By virtue of sec. 104 (2) (*b*) of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, an appeal lies at the instance of any person aggrieved from an order of the High Court in Bankruptcy to the Court of Appeal. Such appeal is final, unless the Court of Appeal should give leave to appeal to the House of Lords (s. 104 (2) (*c*)).

The right of appeal conferred by the section is quite distinct from the right of re-hearing conferred on every Court having jurisdiction in bankruptcy by sub-sec. 1 of sec. 104, which is confined to orders made by the judge in exercise of his bankruptcy jurisdiction (*In re Suffield & Watts, Ex parte Brown*, 1888, 20 Q. B. D. 693). A re-hearing of a bankruptcy matter ought not, as a rule, to be allowed after the expiration of the time limited for appealing from the order, and, *semble*, an application for a re-hearing should not be made *ex parte* (*Ex parte Ritso, In re Ritso*, 1883, 22 Ch. D. 529).

As to the meaning of the term "any person aggrieved" used in the section, see Williams on *Bankruptcy*, 8th ed., pp. 334, 335.

Appeals in Bankruptcy are governed by Rules 129-133 of the Bankruptcy Rules, 1886 to 1890, which provide (r. 129, as amended 5th January 1905) that no appeal shall be brought—

(*a*) Without the leave of the Court, or of the Court of Appeal, from any order made by consent or as to costs only, or from any order relating to property when it is apparent from the proceedings that the money or money's worth involved does not exceed £50.

(*b*) From an omission by the Court to exercise a discretionary power, unless, on application made to it, the Court shall have refused to exercise such power, in which latter case an appeal from the refusal may be brought.

Time for Appealing.—The time for appealing is twenty-one days, calculated from the time at which the order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application, from the date of such refusal (r. 130). An order is "perfected" within

the rule when it is signed by the registrar under Rule 109, and the time for appealing runs from the date of such signature (*In re Helsby, Ex parte the Trustee*, [1894] 1 Q. B. 742).

Under special circumstances the time may be extended (*Ex parte Geisel, In re Stanger*, 1882, 22 Ch. D. 436).

Security for Costs.—Security for the costs of appeal must be given by the lodgment in Court by the appellant of the sum of £20, subject, however, to the power of the Court of Appeal to increase or diminish the amount of the security, or to dispense with it (r. 131). [See cases cited, Williams on *Bankruptcy*, p. 448.]

Entering the Appeal.—Upon entering an appeal a copy of the appeal must be forthwith sent by the appellant to the registrar of the Court appealed from, who must mark thereon the date when received, and file it with the proceedings (r. 132).

It is of the first importance that this rule should be complied with, inasmuch as, in the absence of special circumstances, the Court will not extend the time for compliance, and the omission to comply will not be treated as an irregularity which can be cured (*In re Vitoria, Ex parte The Spanish Corporation, Limited*, [1894] 1 Q. B. 259).

Notice of Appeal.—The notice of appeal is a fourteen-days' notice (*In re Landau, Ex parte Brown*, 1887, 4 Mor. 253), which must be served on the respondent within the twenty-one days limited for appealing (*Ex parte Viney, In re Gilbert*, 1877, 4 Ch. D. 794; *Christopher* v. *Croll*, 1885, 16 Q. B. D. 66).

Subject to the special provisions stated above, Order 58 of the Rules of the Supreme Court applies to bankruptcy appeals.

Service on Official Receiver or Trustee.—The official receiver must be served with notice of appeal from a receiving order (*In re Webber, Ex parte Webber*, 1889, 24 Q. B. D. 313). But, although served with notice of appeal, he ought not to appear on the hearing unless there are material circumstances which he desires to bring before the Court (*S. C.* p. 317, following *Ex parte Dixon, In re Dixon*, 1884, 13 Q. B. D. 118). And so a trustee, who appears and only asks for his costs, will not be allowed his costs of appearance (*Ex parte Arden, In re Arden*, 1884, 14 Q. B. D. 121).

[See BANKRUPTCY.]

Chambers, Appeals from.—We have already seen that under sec. 50 of the Judicature Act, 1873, no appeal lies from an order made in chambers, except by leave of the Court, unless an application has been made to set aside or discharge the order to a Divisional Court, or to a judge sitting in Court, according to the practice of the Division of the High Court to which the particular matter is assigned. This provision, however, must be read in connection with the Judicature (Procedure) Act, 1894, s. 1, which forbids any appeal, unless by leave of the Court, with certain specified exceptions, from any interlocutory order or interlocutory judgment made or given by a judge; and, where leave has been given (*In re Oddy*, [1895] 1 Q. B. 392), provides that in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal. The effect of this section has been to abolish in many instances in the King's Bench Division an appeal intermediate between the decision of the judge and recourse by the suitor to the Court of Appeal, and in all the Divisions to restrict the right of appeal in mere interlocutory business.

The mode of bringing on an appeal from chambers varies in the Chancery and King's Bench Divisions respectively.

Chancery Division.—An unsuccessful litigant in chambers in the Chancery Division has still, as before the Act of 1894, three alternatives: (1) To move before the judge in Court to discharge the order made in chambers; (2) to have the matter adjourned into Court; (3) to obtain the leave of the judge to go direct to the Court of Appeal, upon a certificate that no further argument is required (*Boake* v. *Stevenson*, [1895] 1 Ch. 358).

The proper course, where either or both parties do not intend to accept the decision of the judge as final, is to ask that the summons may be adjourned into Court for argument (*Forrester* v. *Jones*, W. N. 1899, 78). If the case is argued in chambers, and no certificate is given by the judge, a motion to discharge the order must be made in Court (*Holloway* v. *Cheston*, 1881, 19 Ch. D. 516). Such an application is not an appeal (*In re Giles; Real and Personal Advance Co.* v. *Michell*, 1890, 43 Ch. D. 391). But the analogy to the practice on appeals must be followed as to the time for moving (*Heatley* v. *Newton*, 1881, 19 Ch. D. 326; *In re Giles* (*ubi sup.*)); and the notice of motion must therefore be served within fourteen days from the time when the order was pronounced or when the party moving first had notice of it (*In re Woodbridge*, W. N. 1884, 187; Order 58, r. 15). There is, however, no distinction in this respect between an interlocutory or final order, the time for moving being in either case fourteen days (*In re Johnson; Manchester and Liverpool Banking Co.* v. *Beales*, 1889, 42 Ch. D. 505; *In re Giles* (*ubi sup.*)).

These preliminaries being complied with, and leave to appeal, where necessary, having been obtained either from the judge or the Court of Appeal, an appeal from an order of a judge at chambers in the Chancery Division proceeds in the ordinary way.

King's Bench Division.—The procedure on appeals from chambers in the King's Bench Division differs in some important particulars from that governing similar appeals in the Chancery Division. This arises to a great extent from the difference in the jurisdiction of the masters in the two Divisions. In the Chancery Division every application in chambers comes in the first instance before the master, who, however, except so far as his certificate is concerned, is an impersonal officer. In theory every order, though actually made by a master, is deemed to be an order of the judge. There is, therefore, no appeal from the master to the judge, though it is the absolute right of the suitor to have any matter, in which he is dissatisfied with the ruling of the master, adjourned to be dealt with by the judge in person. In the King's Bench Division, on the other hand, a master may transact all business and exercise all authority and jurisdiction in respect of the same as under the Judicature Acts or Rules may be transacted or exercised by a judge at chambers, with certain specified exceptions (Order 54, r. 12). It follows that in cases within the jurisdiction of the master applications in the first instance come before him, whilst in the excepted cases the application is made, usually by summons, direct to the judge at chambers. From the decision of a master an appeal lies to a judge at chambers, either by indorsement on the summons made by the master at the request of any party, or by notice in writing to attend before the judge within four days after the decision complained of, or such enlarged time as may be allowed by the judge or master. The procedure by notice is that usually adopted.

From the judge at chambers, in matters of practice and procedure, an appeal lies direct to the Court of Appeal (Jud. Act, 1894, s. 1 (4); Order 54, r. 23). This is, of course, subject to the provisions of the Act, making an order of the judge at chambers final in the cases specified in the Act, unless leave to appeal be obtained. As to what are "matters of practice and procedure" within the Act, see *The Annual Practice*, notes to the Act, and to Rule 23 of Order 54, and particularly *In re Oddy*, [1895] 1 Q. B. 392; *M'Hary* v. *Universal Stock Exchange*, [1895] 2 Q. B. 81. "The practice and procedure mentioned in the section cover matters of practice and procedure in connection with a cause or matter in the High Court" (*per* A. L. Smith, L.J., *Watson* v. *Petts* [1899], 1 Q. B. 54). In cases not within the provision we have been considering, an appeal from the decision of a judge at chambers is to a Divisional Court. [See *infra*, p. 397.] In cases within the section, the old practice of the judge at chambers, referring the matter to the Divisional Court, is abolished, nor can he refer it to the Court of Appeal. He must now either make an order or refuse it, giving leave to appeal, if he thinks fit so to do (*Hood-Barrs* v. *Catheart*, 1895, 64 L. J. Q. B. 352; *Roberts* v. *Plant*, 1895, 43 W. R. 308).

District Registry Cases.—It may be observed that, where a case is proceeding in a district registry, an appeal lies from an order, finding, or decision of a district registrar to a judge. Such appeal is brought by way of indorsement on the summons by the registrar at the request of any party, or by notice in writing to attend before the judge within seven days after the party has notice of the order, finding, or decision complained of. There must be at least two clear days between the service of the notice of appeal and the day of hearing (Order 35, r. 9). In the Chancery Division the appeal is to the judge to whom the cause or matter is assigned (r. 12).

The ordinary course is to give notice of appeal, which must be for a day within the seven days fixed by the rule, unless the time be extended. What has been said with regard to an appeal from an order made by a judge at chambers on appeal from a master applies to the case of an appeal from a district registrar.

Probate, Divorce and Admiralty Division.—The provisions of Order 54, r. 12, apply in terms to a registrar in the Probate, Divorce and Admiralty Division; and it has been held that Rule 21, giving a right of appeal to a judge from the decision of a master, applies by analogy to an appeal from a probate registrar (*In re Patrick*, 1889, 14 P. D. 42). An appeal will lie to the Court of Appeal under similar conditions to those which apply to appeals from orders made in chambers in the Chancery Division (*In re Smith*; *Rigg* v. *Hughes*, 1884, 9 P. D. 68). [See CHAMBERS, CHANCERY DIVISION; CHAMBERS, JUDGES'; JUDGE AT CHAMBERS; DISTRICT REGISTRIES.]

New Trials.—Prior to the passing of the Judicature Act, 1890, 53 & 54 Vict. c. 44, known as Finlay's Act, all motions for new trials were heard by a Divisional Court, but by sec. 1 of that Act every motion for a new trial, or to set aside a verdict, finding, or judgment in any cause or matter in the High Court in which there has been a trial with a jury, is to be heard and determined by the Court of Appeal; such motion to be heard and determined before not less than three judges sitting together.

This provision of Finlay's Act brought the practice, in respect of a

motion for a new trial where there has been a trial with a jury, into line with that which previously obtained with regard to an application for a new trial where the case had been tried without a jury (Order 39, r. 1).

The mode of entering in the Court of Appeal a motion for a new trial, or to set aside a verdict, finding, or judgment, is the same whether the trial has been by jury or not (Order 39, r. 1A); but in the case of motions for a new trial after a trial by jury, the provisions of Order 39, r. 4, are made applicable. The notice of motion is therefore a fourteen-days' notice, which must be served, if the trial has taken place in London, or Middlesex, within eight days after the trial, and if elsewhere, within seven days after the last day of sitting on the circuit during which the trial has taken place.

An application for a new trial is by notice of motion, which must state the grounds of the application, and whether all or part only of the verdict or findings is complained of (Order 39, r. 3).

Where the application is on the ground of misdirection, the nature of the misdirection must be stated in the notice of motion (*Pfeiffer* v. *Midland Rly. Co.*, 1886, 18 Q. B. D. 243).

The notice may be amended at any time by leave of the Court or of a judge (Order 39, r. 5).

A new trial will not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned at the trial (Order 39, r. 6).

A new trial may be ordered on any question, whatever be the grounds for the new trial, without interfering with the finding or decision upon any other question (Order 39, r. 7).

As to the grounds for granting a new trial, see the cases cited in *The Annual Practice*, 1906, under Order 39, r. 6; Chitty's *Archbold's Practice*, 14th ed., pp. 730-744. [See NEW TRIAL.]

The considerations which are applicable to new trials after a trial and verdict by a jury do not govern an appeal from a judge sitting without a jury. Such a case is a re-hearing, and it is the duty of the Court to re-hear the case and reconsider the materials which were before the judge, with such other materials as the Court of Appeal may admit (*Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; and see *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q. B. 38).

As to the meaning and effect of Finlay's Act, see *Allcock* v. *Hall*, [1891] 1 Q. B. 444. The Court has jurisdiction, on a motion for a new trial, to direct judgment to be entered for either party instead of ordering a new trial. And on the hearing the Court of Appeal has all such powers as it has upon an appeal (*S. C.*). Thus, in regard to motions for new trials, the Court will exercise the same discretion as to ordering security for costs as in other cases (*Wightwick* v. *Pope*, [1902] 2 K. B. 99).

The section applies where there has been a trial before the under-sheriff and a jury in a cause in the High Court (*William Radam's Microbe Killer Co.* v. *Leather*, [1892] 1 Q. B. 85); and to an interpleader issue tried by a jury (*Coates* v. *Moore*, [1903] 2 K. B. 140). But it does not apply to a trial before an official referee (*Gower* v. *Tobitt*, 1891, 39 W. R. 193).

Divorce.—Where a divorce action has been tried with a jury, an application for a new trial must be made to the Court of Appeal (*Wilkins* v. *Wilkins*, [1896] P. 106). But if not so tried, the Rules of the Supreme Court do not apply, and an application for a re-hearing of a suit for dissolution must be made to a Divisional Court and not to the Court of Appeal, in accordance with Rule 62 of the Divorce Rules (*Smith* v. *Smith*, [1897] P. 293; and see *Watson* v. *Watson*, 1903, 89 L. T. 78). [See NEW TRIAL.]

Workmen's Compensation Act, 1897, *under.*—By the Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37, sched. II., 4, it is provided that an arbitrator under the Act may, if he thinks fit, submit any question of law for the decision of the County Court judge, whose decision on any question of law, either on such submission, or in any case where he himself settles the matter under the Act, is final, unless within the time and in accordance with the conditions prescribed by Rules of Court either party appeals to the Court of Appeal.

By Rule 36 of the Workmen's Compensation Rules, 1898, such appeals are to be had in accordance with the provisions of the Rules of the Supreme Court relating thereto.

Every appeal is by notice of motion in accordance with Order 59, r. 10, which requires that it shall state the grounds of appeal, and whether all or part only of the judgment, order, or finding is complained of. The notice of motion is an eight-days' notice, and must be served on every party directly affected by the appeal. It must be set down under Order 58, r. 8, within the time limited by Order 59, r. 12, that is to say, within twenty-one days from the date of the judgment, order, or finding complained of, such period being calculated from the time at which the judgment or order was signed, entered, or otherwise perfected, or from the time at which the finding or any refusal was made or given (Order 58, r. 20 (*a*)).

The party appealing must apply to the judge of the County Court for a signed copy of the note made by him of any question of law raised before him, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision on the question or matter submitted to him, and furnish such copy for the use of the Court of Appeal. If such notes are not produced in Court, the Court of Appeal has power to hear and determine the appeal upon any other evidence or statement of what occurred before the judge of the County Court which the Court of Appeal may deem sufficient (Order 58, r. 20 (*b*)).

Rule 14 of Order 59 (providing that an appeal is not to operate as a stay unless the inferior Court so orders, or unless within ten days after the decision security is given), and Rule 16 of the same order (giving powers to the High Court of extending the time for appealing, or to amend the grounds of appeal, or to make any other order to ensure the determination on the merits of the real question in controversy), apply to appeals under the Act (Order 58, r. 20 (*c*)).

With the above exceptions, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal apply to appeals under the Act (Order 58, r. 20 (*d*)).

No appeal lies under the Act except as provided by Schedule II. (4) (*Leech* v. *Life and Health Assurance Association*, [1901] 1 K. B. 707). Appeals under sec. 5, therefore, lie to a Divisional Court (*Kniveton* v. *Employers' Mutual Indemnity Co.*, [1902] 1 K. B. 880; *Morris* v. *Same*,

[1902] 2 K. B. 165). No appeal lies to the Court of Appeal upon the award of an arbitrator appointed by a County Court judge under Schedule II. (2) of the Act (*Gibson* v. *Wormald*, [1904] 2 K. B. 40).

Appellants under the Act can be ordered to give security for the costs of the appeal (*Hall* v. *Snowdon, Hubbard & Co.*, [1899] 1 Q. B. 593; *Harwood* v. *Abrahams*, [1901] 2 K. B. 304).

The appeal is entered at the Crown Office by lodging a copy of the notice of appeal.

After judgment of the Court of Appeal the order of such Court or an office copy may be deposited by either party with the County Court registrar, who must file such order or copy, and transmit a copy to the judge, and such order has the same effect as if it had been a decision of the judge (Workmen's Compensation Rules, 1898, r. 37 (1)).

If the order has the effect of an award or decision in the matter in favour of any party, it must be served and recorded, and may be proceeded on in the same manner as if it had been an award or decision of the judge (*Ibid.* (2)).

If it be to the effect that an award be made or a decision given in favour of any party, the judge must make such award or give such decision (*Ibid.* (3)).

If it involves a re-hearing or further hearing of the arbitration or special case, the judge must appoint a time for such hearing or further hearing, and cause notice thereof to be given to the parties (*Ibid.* (4)).

The judge must make such award or give such decision, and give such directions, and take or direct to be taken such proceedings in the matter as may be necessary to give effect to the order of the Court of Appeal (*Ibid.* (5)).

[See Workmen's Compensation.]

Agricultural Holdings Act, 1900, *under*.—By the Agricultural Holdings Act, 1900, 63 & 64 Vict. c. 50, s. 2 (6), it is provided that if in any arbitration under the Act the arbitrator states a case for the opinion of the County Court on any question of law, the opinion of the Court on any question so stated is final, unless within the time and in accordance with the conditions prescribed by the Rules of the Supreme Court either party appeals to the Court of Appeal, from whose decision no appeal lies.

Rule 20 of Order 58, stated *supra*, applies to appeals under this Act as well as to appeals under the Workmen's Compensation Act, 1897.

[See Tenant Right.]

It may be remarked that the provisions in these two Acts as to appeal are exceptions to the general rule, under which appeals from a County Court lie to a Divisional Court, and not to the Court of Appeal.

Railway and Canal Traffic Act, 1888, *under*.—By sec. 17 (1) of the Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, no appeal lies from the Commissioners appointed under that Act upon a question of fact, or upon any question regarding the *locus standi* of a complainant.

An appeal lies from the Commissioners to a superior Court of Appeal, *i.e.* in England or Ireland to the Court of Appeal, upon any question of law (*Ibid.* (2)).

An appeal must conform with such rules of Court as may from time to time be made in relation to such appeal (*Ibid.* (3)).

On the hearing of an appeal the Court of Appeal may draw all such inferences as are not inconsistent with the facts expressly found and are necessary for determining the question of law, and has all such powers for the purpose as if the appeal were one from a judgment of a superior Court, and may make any order which the Commissioners could have made, and also such further or other order as may be just; and the costs of and incidental to the appeal are in the discretion of the Court of Appeal, but no Commissioner can be ordered to pay any costs (*Ibid.* (4)).

The decision of the Court of Appeal is final, subject to a right of appeal to the House of Lords, by leave, where there has been a difference of opinion between any two of the superior Courts of Appeal (*Ibid.* (5)).

By Order, dated 10th April 1889, the Rule Committee directed that Order 58 of the Rules of the Supreme Court should, so far as applicable, apply to all appeals from the Commissioners under the Act.

[See RAILWAY AND CANAL COMMISSION; RAILWAY COMMISSIONERS.]

Lancaster Palatine Court, from.—Prior to the passing of the Judicature Act, 1873, the Chancellor of the Duchy and County Palatine of Lancaster and the two Lords Justices of the Court of Appeal in Chancery formed the Court of Appeal in Chancery of the County Palatine (see the Chancery of Lancaster Act, 1854, 17 & 18 Vict. c. 82, s. 1). By sec. 18 (2) of the Judicature Act, 1873, the jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of Lancaster, and all jurisdiction and powers of the Chancellor of the Duchy, when sitting alone or apart from the Lords Justices of Appeal in Chancery as a judge of re-hearing or appeal from decrees or orders of the Court of Chancery of the County Palatine of Lancaster, were transferred to the Court of Appeal.

Finally, the Chancery of Lancaster Act, 1890, 53 & 54 Vict. c. 24, provides that the Court of Appeal shall, as to all judgments and orders of the Lancaster Chancery Court, have and exercise the like appellate and original jurisdiction as it exercises with respect to judgments and orders of the High Court.

All judgments and orders of the Court of Appeal in causes and matters in the Lancaster Chancery Court are subject to appeal to the House of Lords in the same manner as judgments and orders of the Court of Appeal in causes or matters in the High Court.

[See LANCASTER, DUCHY AND COUNTY PALATINE OF.]

Liverpool Court of Passage, from.—Sec. 10 of the Liverpool Court of Passage Act, 1893, 56 & 57 Vict. c. 37, provides that an appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at Nisi Prius, and subject to the same rules, regulations and provisions. By virtue of such section appeals from orders of the judge of the Liverpool Passage Court lie to the Court of Appeal, and not to a Divisional Court (*Anderson* v. *Dean*, [1894] 2 Q. B. 222). An appeal lies to the Court of Appeal from the ruling of the judge of the Liverpool Court of Passage at the trial of an interpleader issue (*Coates* v. *Moore*, [1903] 2 K. B. 140).

Under secs. 6 and 10 of the Act the judge of the Court has power to give leave to appeal to the Court of Appeal from an interlocutory order made by him (*Hunter* v. *Jacobson*, 1899, 80 L. T. 641).

[See PASSAGE COURT OF LIVERPOOL.]

Durham Palatine Court, from.—The Court of Appeal has authority to hear and determine appeals from any judgment on order of the Chancellor of Durham, and the provisions of the Judicature Acts and of the Rules of the Supreme Court apply to such appeals. From the Order of the Court of Appeal a further appeal lies to the House of Lords (Palatine Court of Durham Act, 1889, 52 & 53 Vict. c. 47, s. 11).

[See DURHAM, COUNTY PALATINE OF.]

II. APPEALS TO DIVISIONAL COURTS.

Origin of Divisional Courts.—Divisional Courts owe their existence to the Judicature Act, 1873, sec. 40 of which provides that such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the High Court, which shall for that purpose exercise all or any part of the jurisdiction of the High Court. In two only of the Divisions of the High Court of Justice do the judges of those Divisions sit from time to time as Divisional Courts, viz., the King's Bench Division and the Probate, Divorce, and Admiralty Division. The framers of the Judicature Act, 1873, indeed, contemplated that such Courts should be constituted both in the Chancery Division and in the Court of Appeal (ss. 43, 53), but these provisions have been since repealed (Statute Law Revision Act, 1883; Jud. Act, 1875, s. 33).

Constitution.—In the King's Bench Division a Divisional Court consists of two judges, or of more than two if the President of the Division, with the concurrence of not less than two other judges, should think it expedient (Appellate Jurisdiction Act, 1876, s. 17; Jud. Act, 1884, s. 4).

In the Probate, Divorce, and Admiralty Division, a Divisional Court is composed of the President and the other judge of that Division.

Jurisdiction.—The jurisdiction of Divisional Courts is twofold—(*a*) Original and (*b*) Appellate. We are not now concerned with the former, which is dealt with under SUPREME COURT; here we have only to consider the powers and jurisdiction of Divisional Courts as Courts of Appeal. It has already been pointed out that that jurisdiction has of late years been very considerably curtailed by the transfer to the Court of Appeal under Finlay's Act of the power to hear motions for new trials, and by the provisions of the Judicature Act, 1894, which constitutes the Court of Appeal the proper tribunal to deal with appeals from a judge in matters of practice and procedure. Notwithstanding this loss of authority the appellate jurisdiction still exercised by Divisional Courts is considerable. It is derived mainly from the 45th sec. of the Judicature Act, 1873, providing that all appeals from Petty or Quarter Sessions, from a County Court, or from any other inferior Court which might before the Act have been brought to any Court or judge, may be heard and determined by Divisional Courts. The determination of such Courts is final, unless leave be given by the Divisional Court to appeal to the Court of Appeal.

Sec. 45 modifies those Acts which restrict the right of appeal in cases falling within the operation, and therefore sec. 20 of the Appellate Jurisdiction Act, 1876, does not prevent an appeal to the Court of Appeal, where under the section leave to appeal has been given (*Crush* v. *Turner*, 1878, 3 Ex. D. 303; *Thomas* v. *Kelly*, 1888, 13 App. Cas. 506). But the section only applies to appeals from inferior Courts which might

have been brought before the passing of the Act to any Court or judge whose jurisdiction is by the Act transferred to the High Court (*Hall* v. *London, Brighton and South Coast Railway Co.*, 1886, 17 Q. B. D. 230).

The section must be read in connection with sec. 1 (5) of the Judicature Act, 1894, under which, in all cases where there is a right of appeal to the High Court from any Court or person, the appeal must be heard and determined by a Divisional Court, whose determination is final, unless leave to appeal is given by the Divisional Court or by the Court of Appeal.

The above sub-section has no reference to an application made to a Divisional Court to review the findings of an official referee, to whom an action has been referred. Such an application is not an appeal from any Court or person within the meaning of the sub-section, and consequently an appeal lies to the Court of Appeal, without leave, from a decision of the High Court in such a case (*Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475). See also *M'Harg* v. *Universal Stock Exchange Co.*, [1895] 2 Q. B. 83. In a case where the leave of the judge to appeal to the High Court is required, the giving of leave creates a right of appeal within the sub-section, and a further appeal lies to the Court of Appeal by leave of the Divisional Court hearing the appeal, or of the Court of Appeal (*Moore, Nettlefold & Co.* v. *The Singer Manufacturing Co.*, [1904] 1 K. B. 820).

Power to make Rules as to Appeals from Inferior Courts.—Sec. 23 of the Judicature Act, 1884, provides that the power to make rules conferred by the Judicature Act, 1875, and enactments amending the same, shall be deemed to include the power to make rules for regulating the procedure on appeals from inferior Courts to the High Court.

What Appeals are heard by Divisional Courts.—The following appeals are heard and determined by Divisional Courts:—

A. King's Bench Division.—Divisional Courts in the King's Bench Division have jurisdiction over appeals brought from the following Courts:—

(*a*) *Petty Sessions.*—See Judicature Act, 1873, s. 45; Summary Jurisdiction Act, 1857, 20 & 21 Vict. c. 43, s. 2; Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 33; Summary Jurisdiction Rules, 1886, r. 18. See Short and Mellor's *Crown Office Practice*, 1890, pp. 472-479.

[See PETTY SESSIONS.]

(*b*) *Quarter Sessions*—except in respect of cases stated under the Crown Cases Act, 1848, 11 & 12 Vict. c. 78, or the Quarter Sessions Act, 1849, 12 & 13 Vict. c. 45. See Judicature Act, 1873, s. 45; Judicature Act, 1894, s. 2; *R.* v. *Swindon Local Board*, 1880, 49 L. J. Q. B. 522; *Goodwin* v. *Sheffield Corporation*, [1902] 1 K. B. 629.

[See QUARTER SESSIONS.]

(*c*) *County Courts.*—See Judicature Act, 1873, s. 45; County Courts Act, 1888, s. 120; R. S. C. O. 59, r. 1 (*c*). Sec. 120 of the County Courts Act, 1888, limits the right of appeal by providing that there shall be no appeal in any action of contract or tort, other than an action of ejectment, or an action in which the title to any corporeal or incorporeal hereditaments shall have come in question where the debt or damage claimed does not exceed twenty pounds, nor in any action of replevin where the amount of rent or the damage or value of the goods seized does not exceed twenty pounds, nor in any action for the recovery of tenements where the yearly rent or value of the premises does not

exceed twenty pounds, nor in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal.

A further limit on the right of appeal is imposed by the County Courts Act in cases where the parties have, before the decision of the judge is pronounced, agreed in writing that his decision shall be final (s. 123).

The power of appealing is confined to cases in which a party is dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence (s. 120) Where therefore there is no jury, the judge's findings of fact are final (*Smith* v. *Baker*, [1891] A. C. 325). As to County Court appeals generally, see *Annual County Court Practice*, 1906, pp. 452-468).

[See COUNTY COURTS.]

(*d*) *County Courts in Bankruptcy Matters.*—See Bankruptcy Appeals (County Courts) Act, 1884, 47 & 48 Vict. c. 9, s. 2. Under that section the judge to whom bankruptcy business is assigned, must, for the purpose of hearing an appeal, be a member of the Divisional Court to which the appeal lies. The decision of the Divisional Court is final and conclusive, unless special leave be given by the Divisional Court, or by the Court of Appeal, to appeal to the Court of Appeal, whose decision is final and conclusive.

Any order or direction incidental to an appeal, and not involving the decision of the appeal, may be given by the judge of the High Court for the time being exercising bankruptcy jurisdiction, but any such order or direction may be discharged or varied by the High Court. The appeal from an order or direction of the judge is to a Divisional Court constituted to hear appeals from County Courts under the Bankruptcy Appeal (County Courts) Act, 1884 (*In re Dunhill, Ex parte Wilson*, [1894] 2 Q. B. 554).

[See BANKRUPTCY; COUNTY COURTS.]

(*e*) *Other Inferior Courts.*—See Judicature Act, 1873, s. 45; Judicature Act, 1875, s. 15; Judicature Act, 1884, s. 24.

The following appear to be the principal inferior Courts, other than County Courts, within s. 45, viz.:—

The Mayor's Court of London.—See Mayor's Court of London Procedure Act, 1857, 20 & 21 Vict. c. 157. An appeal lies under sec. 45 to a Divisional Court (*Appleford* v. *Judkins*, 1878, 3 C. P. D. 469), except for error arising upon the record, in which case an appeal lies direct to the Court of Appeal (*Le Blanch* v. *Reuter's Telegraph Co.*, 1876, 1 Ex. D. 408; *Pryor* v. *City Offices Co.*, 1883, 10 Q. B. D. 504). See Short and Mellor's *Crown Office Practice*, 1890, pp. 480-482.

[See LONDON CITY.]

The Salford Hundred Court.—See the Salford Court of Record Act, 1868, 31 & 32 Vict. c. 130.

The Liverpool Court of Passage.—As we have already seen, p. 393, *supra*, appeals from this Court lie direct to the Court of Appeal under the Liverpool Court of Passage Act, 1893 (*Anderson* v. *Dean*, [1894] 2 Q. B. 222).

[See PASSAGE, COURT OF.]

Vice-Chancellor's Court of University of Oxford.—See 25 & 26 Vict.

c. 26. By Order in Council, dated 23rd August 1894, issued pursuant to sec. 15 of the Judicature Act, 1875, the enactments relating to appeals from County Courts apply to this Court.

[See also INFERIOR COURTS, where a complete list of such Courts is given.]

Where no Statute regulating Appeals from Inferior Courts.—In cases where there is no statute regulating an appeal from an inferior Court of record of civil jurisdiction, an appeal can now be brought to the King's Bench Division, by virtue of the fact that before the Judicature Acts error lay to the King's Bench from all inferior Courts, and that by those Acts appeals were substituted for proceedings in error (*Darlow* v. *Shuttleworth*, [1902] 1 K. B. 721).

(*f*) *From Chambers.*—(Order 59, r. 1 (*i*). This must be read in connection with the Judicature Act, 1894, s. 1 (4), under which (*supra*, p. 389) appeals from a judge in matters of practice and procedure go direct to the Court of Appeal.

(*g*) *From Revising Barristers, and in Proceedings relating to Election Petitions, Parliamentary and Municipal.*—(Order 59, r. 1 (*b*)). See Judicature Act, 1881, s. 14, under which the jurisdiction of the High Court to decide questions of law, upon appeal or otherwise, under the Parliamentary Registration Act, 1843, 6 & 7 Vict. c. 18 [see secs. 42, 45, 60, 62-70]; the County Voters' Registration Act, 1865, 28 & 29 Vict. c. 36; the Parliamentary Electors' Registration Act, 1868, 31 & 32 Vict. c. 58; the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60, repealed and superseded by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, pt. iv., as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70; the Parliamentary and Municipal Registration Act, 1878, 41 & 42 Vict. c. 26, [see secs. 35, 37, 38] or any of such Acts, or any Act amending the same, is final and conclusive, unless leave be given by the High Court to appeal to the Court of Appeal, whose decision is final and conclusive. See also Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50; Local Government Act, 1888, 51 & 52 Vict. c. 41; Local Government Act, 1894, 56 & 57 Vict. c. 73; Order in Council as to Revising Barristers, 15th Aug. 1890; Registration Order, 1895.

Under the section the decision of the High Court is absolutely final, unless leave to appeal be given (*Unwin* v. *M'Mullen*, [1891] 1 Q. B. 694).

The section applies to questions of law arising on interlocutory applications (*Shaw* v. *Reckitt*, [1893] 2 Q. B. 59). As to matters preliminary to an election petition, see *Harman* v. *Park*, 1881, 6 Q. B. D. 323, followed in *Monkswell* v. *Thompson*, [1898] 1 Q. B. 353. In such cases an appeal lies from the High Court to the Court of Appeal.

An appeal from a refusal to take a petition off the file lies to a Divisional Court (*Pope* v. *Bruton*, 1900, 17 T. L. R. 182). See Short and Mellor's *Crown Office Practice*, 1890, pp. 495-506; Rogers on *Elections*, 16th ed., 1897; Fraser's *Law of Parliamentary Elections and Election Petitions*.

[See ELECTION COMMISSIONERS; ELECTION PETITION; ELECTIONS; REGISTRATION OF VOTERS; REVISING BARRISTERS.]

(*h*) *Arbitration.*—Under sec. 8 of the Judicature Act, 1884, an appeal lay to the Divisional Court from any award or certificate of a referee or arbitrator where there had been a compulsory reference

to arbitration; and see Order 59, r. 3. The process of compulsory reference to arbitration exists no longer, so that sec. 8 appears to be spent.

In the case of a reference for trial under sec. 14 of the Arbitration Act, 1889, 52 & 53 Vict. c. 49, an appeal from the decision of the referee lies in the King's Bench Division to a Divisional Court (*Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475). Such application is made under Order 36, r. 52, and Order 40, r. 6, and on the hearing the Court has power to remit the cause or matter for re-trial or reconsideration, or may decide the question referred to the referee on the evidence taken before him, with or without additional evidence; and may set aside the referee's judgment and enter any other judgment.

[See ARBITRATION.]

B. Probate, Divorce, and Admiralty Division.—Probate and Admiralty appeals from inferior Courts, and from justices, lie to a Divisional Court of the Probate, Divorce, and Admiralty Division (Order 59, r. 4).

Divorce.—Appeals under the Summary Jurisdiction (Married Women) Act, 1895, 58 & 59 Vict. c. 35, which takes the place of sec. 4 of the Matrimonial Causes Act, 1878, 41 & 42 Vict. c. 19, are heard by a Divisional Court of the same Division (sec. 11). See *Swoffer* v. *Swoffer*, [1896] P. 131. The only appeal from an original order under the Act is to the Probate, Divorce, and Admiralty Division (*Manders* v. *Manders*, [1897] 1 Q. B. 474); but an appeal lies by way of special case to the King's Bench Division from an order to enforce payment under sec. 9 of the Act (*Ruther* v. *Ruther*, [1903] 2 K. B. 270). See Browne and Powles on *Divorce*, 7th ed., 1905, pp. 195, 202.

An application for the re-hearing of a divorce cause heard without a jury must be to a Divisional Court (*Smith* v. *Smith*, [1897] P. 293; *Watson* v. *Watson*, 1903, 89 L. T. 78). See Browne and Powles, pp. 203, 494.

Admiralty.—Admiralty appeals lie to Divisional Courts from County Courts and other inferior Courts having Admiralty jurisdiction. The appeal sections of the County Courts Act, 1888, apply to the Admiralty side of a County Court, where the appeal is on a question of law, whether the amount recovered be over or under £50 (*The Eden*, [1892] P. 67; *The Delano*, [1895] P. 40). If, however, the appeal be on a question of fact, it may be brought under the provisions of the County Courts Admiralty Jurisdiction Act, 1868, 31 & 32 Vict. c. 71, where the amount decreed or ordered to be due exceeds the sum of £50 (s. 31), but security for costs must be given (s. 26).

The 31st section of the County Courts Admiralty Jurisdiction Act, 1868, does not, it seems, apply to interlocutory orders, from which, with leave of the judge, an appeal can be brought, although the amount claimed does not exceed £50 (*The Alert*, 1894, 72 L. T. 124). See Williams and Bruce, *Admiralty Practice*, 3rd ed., 1902, pp. 517-519; *Annual County Courts Practice*, 1906, vol. ii. p. 113.

Appeals also lie to Divisional Courts of the Probate, Divorce, and Admiralty Division under secs. 475, 478 of the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, from the decisions of authorities constituted under those sections. See Shipping Casualties Rules, 1895, rr. 19, 20; Williams and Bruce, pp. 530-535.

Appeals also lie to Divisional Courts of the same Division from the Salvage Commissioners of the Cinque Ports, though the Port of Ad-

miralty of the Cinque Ports has concurrent jurisdiction (1 & 2 Geo. IV. c. 76, s. 4; Jud. Act, 1873, ss. 3, 4, 16, 76). It seems that there has at present been no instance of an appeal to the High Court from the Salvage Commissioners. See Williams and Bruce, pp. 512-516.

[See ADMIRALTY ACTION.]

Probate.—Sec. 58 of Court of Probate Act, 1857, 20 & 21 Vict. c. 77, gives an appeal to the Probate Court to any party dissatisfied with the determination of the judge of a County Court in point of law or upon the admission or rejection of any evidence. Such appeals now lie to Divisional Courts of the Probate, Divorce, and Admiralty Division. See Powles and Oakley's *Probate Practice*, pp. 487-489; *Annual County Courts Practice*, 1906, p. 52.

[See PROBATE.]

Procedure on Appeals to Divisional Courts. — The course of procedure before Divisional Courts is regulated by the rules of Order 59 of the Rules of the Supreme Court.

Form of Appeal.—Every appeal from County Courts and other inferior Courts is by notice of motion, which must state the grounds of the appeal, and whether all or any part of the judgment, order, or finding is complained of (Order 59, r. 10).

Appeals from County Courts by way of special case are now abolished (*R.* v. *Kettle*, 1886, 17 Q. B. D. 761), except perhaps where expressly conferred by statute (*Wilkinson* v. *Jagger*, 1888, 20 Q. B. D. 423), and even then the appeal may be by way of motion (*Kirkheaton Local Board* v. *Ainley*, [1892] 2 Q. B. 274).

Length and Service of Notice.—The notice of motion is an eight-days' notice, and must be served on every party directly affected by the appeal (Order 59, r. 10).

Service on the London agents of the respondent's solicitors is insufficient (*Powell* v. *Thomas*, [1891] 1 Q. B. 97; *Jackson* v. *Margrett*, 1893, 41 W. R. 267).

Entry of Appeal.—The appeal is entered at the Crown Office department of the Central Office (Order 59, r. 11), or in the case of appeals under the Summary Jurisdiction (Married Women) Act, 1895, in the Divorce Registry (Order 59, r. 4A).

Time for Service of Notice and Entry of Appeal.—The notice of motion must be served and the appeal entered within twenty-one days from the date of the judgment, order, or finding complained of, which must be calculated from the time at which the judgment or order was signed, entered, or otherwise perfected, or from the time at which the finding or any refusal was made or given (Order 59, r. 12).

The time for appealing against an order of a County Court judge granting or refusing a new trial, runs from the date of the judge's decision (*Dingor* v. *Matthews*, 1891, 65 L. T. 748*n*; *Pole* v. *Bright*, [1892] 1 Q. B. 603).

Notes of Judge of Inferior Court.—In the case of appeals from inferior Courts other than County Courts, the Master of the Crown Office must forthwith, upon the entry of the appeal, apply to the judge of the inferior Court for a copy of the notes of the evidence given, and for a statement of his judgment or finding on any question of law under appeal. Either party is entitled, upon payment of the proper fee, to obtain an office copy of such notes and statement (Order 59, r. 13).

As regards appeals from County Courts the above rule is impliedly

repealed by sec. 121 of the County Courts Act, 1888 (*M'Grah* v. *Cartwright*, 1889, 23 Q. B. D. 3). In the case of such appeals the judge, at the request of either party, must make a note of any question of law raised at the trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter (County Courts Act, 1888, s. 120), And by sec. 121 the judge, at the expense of any person or persons being party or parties in the action or matter, must furnish a copy of his note, or allow a copy to be taken of the same by or on behalf of such person or persons, and must sign the same, whether a notice of motion in the matter of an appeal has been served or not. These provisions do not constitute a condition precedent to the right of appeal (*Wohlgemuthe* v. *Coste*, [1899] 1 Q. B. 501, following *Seymour* v. *Coulson*, 1880, 5 Q. B. D. 359). If no request is made the judge is not bound to take a note or to furnish or sign a copy (*Morgan* v. *Rees*, 1881, 6 Q. B. D. 508). Where no point of law is raised at the trial, the judge is justified in adding a statement to that effect to his note of the evidence (*Clifford* v. *Thames Ironworks Co.*, 1898, 67 L. J. Q. B. 244).

If the notes of the judge are not produced, the Court may hear and determine the appeal upon any other evidence or statement of what occurred before the judge which the Court may deem sufficient. See *The Crescent*, 1893, 62 L. J. P. 63.

As to the duty of the clerk to the magistrates to make and furnish a note of the evidence, of the decision, and of the reasons for the decision, in appeals under sec. 5 of the Summary Jurisdiction (Married Women) Act, 1895, see *Cobb* v. *Cobb*, [1900] P. 145; *Barker* v. *Barker*, 1905, 74 L. J. P. 74.

Lists of Appeals for Hearing.—Appeals are entered in the proper list for hearing on such days as the Lord Chief Justice of England directs (Order 59, r. 15). They are entered in the civil, and not in the Crown paper.

Appeal no Stay.—An appeal does not operate as a stay of proceedings under the decision appealed from, unless the inferior Court so orders, or unless within ten days after the decision security be given to the satisfaction of such inferior Court, for a sum to be fixed by the Court not exceeding the amount of the money or value of the property affected by the judgment or order appealed from (Order 59, r. 14).

Powers of High Court.—The High Court has power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, in such terms as the Court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties (Order 59, r. 16). See Crown Office Rules, 1886, rr. 255, 256.

Counsel.—The Court will hear only one counsel on each side upon appeals from inferior Courts (*Hawes* v. *Peake*, 1876, 24 W. R. 407).

Powers of Court on the Hearing.—On the hearing of an appeal from an inferior Court, the Divisional Court has power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No appeal will succeed merely on the grounds of misdirection, or improper reception or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned in the Court below (Order 59, r. 7). And see the County Courts Act, 1888, s. 122, under which, on the hearing of County Court appeals, the Court

may order a new trial, or judgment to be entered for any party, or may make a final or other order in such terms as the Court may think proper to ensure the determination on the merits of the real questions in controversy between the parties.

Rules as to Appeals to Court of Appeal to Apply.—Generally the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal apply to appeals from County Courts and other inferior Courts, subject to the special provisions of Order 59, relating to such appeals (Order 59, r. 17). Under this rule a Divisional Court can order security for the costs of an appeal from an inferior Court (*Swain* v. *Follows*, 1887, 18 Q. B. D. 585).

Costs of Appeal.—As a rule the costs of appeal follow the event. Application for them must be made at the time the case is disposed of (*Taylor* v. *Great Northern Railway Co.*, 1866, L. R. 1 C. P. 430). See further *Annual County Courts Practice*, 1906, pp. 467, 468.

Appeals under Midwives Act, 1902.—An appeal from a decision of the Central Midwives' Board under the Midwives Act, 1902, 2 Edw. VII. c. 17, is made to a Divisional Court by notice of motion, supported by affidavit, or, if the Court shall so direct, by oral evidence (Order 59, r. 19).

The notice of motion is an eight-days' notice, and must be filed at the Crown Office, whereupon the appeal will be set down to be heard as if it were an appeal from an inferior Court (Order 59, r. 20).

III. Revenue Appeals.

Appeals Lie to the High Court.—By various statutes affecting questions of revenue a right of appeal is given. Such appeals now lie to the High Court. Prior to the year 1901 they were heard by Divisional Courts of the King's Bench Division under Order 59, r. 1 (*d*). By R. S. C., July 1901, r. 8, that provision was repealed, and appeals are now heard by a single judge of the King's Bench Division, selected each year to deal with revenue cases.

All such appeals are entered in the department of the King's Remembrancer. They are heard on days specially fixed by the Revenue judge on the application of the Attorney-General.

Statutes Conferring a Right of Appeal.—The principal statutes governing such appeals appear to be the following, which are stated in chronological order:—

Excise Management Act, 1827.—By this Act, 7 & 8 Geo. IV. c. 53, s. 84, on appeals to Quarter Sessions from orders of justices on any matter brought before them relating to the revenue of excise, the justices of the peace at General Quarter Sessions are empowered at their discretion to state the facts of any case on which the appeal is made specially for the Court of Exchequer.

Where the judgment of the justices of the peace appealed against is affirmed by the Court, such judgment will be enforced and executed in like manner as if there had been no appeal; and where the judgment appealed against is reversed, and another or different judgment given by the Court, such new judgment will be enforced and executed by the justices of the peace at the General Quarter Sessions (s. 85).

Procedure.—The person requiring a case to be stated under the Act may set down the case in the King's Remembrancer's department. It appears to be open to question whether points showing the contention

of the parties have to be exchanged in appeals under this Act, as is the practice on most revenue appeals. The fees payable are £1 on lodging the case, and £2 on setting down.

[See EXCISE.]

The Fines Act, 1833.—By this Act, 3 & 4 Will. IV. c. 99, the Treasury may direct payment by warrant of fines, issues, amerciaments, penalties, forfeited recognisances, deodands, and sum and sums of money recovered under the Act, to any body corporate or politic, person or persons, entitled to the same, or to their bailiff, steward, or agent. Notwithstanding such payment, any corporation or person aggrieved thereby may apply by petition against the parties to whom payment has been made to refund the sums received by them (s. 35).

In the event of the Treasury rejecting the claims for payment, or in the event of any party being aggrieved by any order of the Commissioners, a right of appeal is given to the Court of Exchequer, the appeal to be brought in a summary way by petition (s. 36).

The jurisdiction of the Court of Exchequer as a Court of Revenue is, by sec. 16 (4) of the Judicature Act, 1873, vested in the High Court.

Procedure.—Petitions of appeal under the Act are filed and set down in the King's Remembrancer's department, a fee of 2s. 6d. being payable on filing the petition, and of £1 on setting down.

Succession Duty Act, 1853.—By sec. 50 of this Act, 16 & 17 Vict. c. 51, any accountable party dissatisfied with the assessment of the Commissioners of Inland Revenue, may, upon giving written notice of his intention to appeal against the assessment within twenty-one days from the date of such assessment, and furnishing a statement of the grounds of appeal, which must be done within the further period of thirty days, appeal by petition to the Court of Exchequer.

Where the sum in dispute in respect of duty does not exceed £50, the accountable party, after giving notice of appeal, and delivering a statement of the grounds of such appeal, may bring his appeal in the County Court within the district of which the appellant resides, or the property is situate.

Procedure.—Petitions are filed in the King's Remembrancer's department, a fee of 2s. 6d. being payable on filing, and £1 on setting down.

[See DEATH DUTIES.]

Taxes Management Act, 1880.—By sec. 59 of this Act, 43 & 44 Vict. c. 19, upon the determination of any appeal against an assessment by the Commissioners for the general purposes of the income tax and inhabited house duties, either the appellant or the surveyor may, if dissatisfied with the determination as being erroneous in point of law, require the Commissioners, by notice in writing addressed to their clerk, to state and sign a case for the opinion of the High Court. The case must set forth the facts and the determination, and must be transmitted within seven days after receipt to the High Court by the appellant, who must give notice in writing of the fact of the case having been stated to the other party, together with a copy of the case.

Procedure.—The Act contains the following provisions as to the procedure to be adopted:—

(*a*) The party requiring the case must, before the case is stated, pay to the clerk to the Commissioners the fee of twenty shillings in respect of the case.

(*b*) The Court is to hear and determine the question of law arising on the case, and reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the Commissioners, with the opinion of the Court thereon, or make such order in the matter and as to costs as to the Court may seem fit.

(*c*) The Court may send the case back for amendment.

(*d*) The jurisdiction vested in the High Court may be exercised by a judge at chambers, as well in vacation as in term time (s. 59 (2)). It is understood, however, that this power has been rarely, if ever, exercised.

An appeal lies from the decision of the High Court to the Court of Appeal, and thence to the House of Lords (s. 59 (3)).

Duty must be paid notwithstanding the appeal, and in the event of alteration in the assessment by the Court, the amount will be adjusted according to the circumstances (s. 59 (4)).

The fee on filing is £1. Points are exchanged between the parties, and the case then set down for hearing. The fee payable on setting down is £2. According to the directions of the judges, the case will not be set down until after the points have been exchanged.

[See HOUSE TAX; INCOME TAX; INLAND REVENUE.]

Customs and Inland Revenue Act, 1885.—By sec. 17 (1) of this Act, 48 & 49 Vict. c. 51, an appeal lies from the assessment by the Commissioners of Inland Revenue of corporation duty, in the same manner as in the case of succession duty. See also sec. 19 (2).

The expenses of taking the account by a person appointed by the Commissioners as mentioned in sec. 17 (1) are, in case of an appeal, in the discretion of the Court (s. 17 (2)).

The duty is payable immediately on assessment, and notwithstanding an appeal; but in the event of the assessment being reduced by order of the Court, the difference in amount will be repaid with such interest (if any) as the Court may allow.

Procedure.—The practice on appeals under the Act is precisely the same as under the Succession Duty Act, 1853 (*vid. supra*).

Stamp Act, 1891.—Under sec. 13 (1) of this Act, 54 & 55 Vict. c. 39, any person dissatisfied with the assessment of stamp duties by the Commissioners of Inland Revenue may, within twenty-one days after assessment, and on payment of the duty, appeal against the assessment to the High Court, and require the Commissioners to state a case. The Commissioners must thereupon state and sign a case, and deliver the same to the appellant within seven days, thereafter it may be set down for hearing (s. 13 (2)).

The Court may order payment of the costs of the appeal (s. 13 (3) (4)).

Procedure.—Points may be exchanged *after* the case is set down. The fee of £1 is payable on filing the case, and £2 on setting down.

Finance Act, 1894.—By sec. 10 (1) of this Act, 57 & 58 Vict. c. 30, any person aggrieved by the decision of the Commissioners of Inland Revenue as to the duty payable under the Act may, on payment of, or giving security for, the duty claimed, appeal to the High Court in the manner and on the conditions directed by rules of Court.

No appeal lies from any order or decision of the High Court without the leave of such Court or of the Court of Appeal (s. 10 (2)).

Costs of the appeal are in the discretion of the Court (s. 10 (3)).

The Court may dispense with payment of the duty, or part of it, pending an appeal, on security for its payment being given to the satisfaction of the Court (s. 10 (4)).

Where the value of the property, in respect of which the dispute arises, does not exceed £10,000, the appeal may be to the County Court of the district in which the appellant resides, or the property is situate (s. 10 (5)).

Questions of disputed value may be referred by the Court to the arbitration of the valuers appointed under the Act, the costs of such arbitration being part of the costs of the appeal (s. 10 (6)).

Procedure.—The practice in respect to appeals under the Finance Act, 1894, is governed by the Rules of the Supreme Court (Finance Act), 1895, the principal provisions of which are as follows :—

A person desiring to appeal must, within one month of notification to him of the decision or claim of the Commissioners, deliver to them a written notice of his grounds of appeal, which must state specifically the grounds on which the appellant relies, identifying the property and stating the value which he contends should be put on it (r. 1).

Within a month from delivery of the statement of the grounds of appeal, the Commissioners must notify to the appellant whether they abandon or maintain their claim (r. 2).

Within one month after such notification the appellant may file a petition in the King's Remembrancer's department, and serve a copy on the Commissioners (r. 3).

The appellant must not in his petition state, or at the hearing be allowed to rely upon, any grounds of appeal not specifically set forth in the statement of the grounds of appeal (r. 4).

Within seven days after filing the petition, the appellant, or, in default, the Commissioners, may set the petition down for hearing upon the revenue side of the King's Bench Division (r. 5).

The Court may order the petition to be heard by a judge of the Chancery Division (r. 6).

Unless otherwise ordered, only oral evidence is admitted at the hearing (r. 7).

If affidavit evidence is admitted, the affidavits are filed in the King's Remembrancer's department (r. 8).

The Crown may administer interrogatories, and obtain discovery and inspection of documents (r. 9).

The Court may allow the petition to be amended (r. 10).

Order 19, r. 27, of R. S. C., 1883, applies to the petition, which is deemed to be a pleading within that rule (r. 11).

Applications for leave to appeal without payment, or on part payment of duty, are by summons before a judge at chambers, and with the summons a copy of any affidavit intended to be used at the hearing of it must be delivered to the Commissioners (r. 12).

A fee of 2s. 6d. is payable on filing, and of £1 on setting down the petition.

[See DEATH DUTIES.]

Licensing Act, 1904.—By sec. 2 (2) of this Act, 4 Edw. VII. c. 23, an appeal lies to the High Court from an assessment of compensation under the Act by the Commissioners of Inland Revenue, in the same manner as under the Finance Act, 1894.

Costs incurred by the Commissioners on an appeal, unless ordered

to be paid by some party other than the Commissioners, are paid out of the compensation money (s. 2 (4)).

No rules have been published as to appeals under the Act, and the same practice has been adopted in the King's Remembrancer's department as in the case of petitions under the Finance Act, 1894 (*vid. supra*).

[See LICENSING.]

Appeals from High Court.—Appeals in revenue cases lie as of right from the High Court to the Court of Appeal, except in the case of appeals under the Finance Act, 1894, where, as we have already seen, there is no such appeal without leave.

The provisions of Order 68 of the Rules of the Supreme Court, 1883, apply to proceedings on the revenue side of the King's Bench Division.

[The writer is indebted for the information contained in this section to the courtesy of Mr. H. A. Hance, of the King's Remembrancer's department.]

IV. APPEALS TO THE HOUSE OF LORDS.

Preliminary Observations.—The final appellate tribunal is the House of Lords. Considerations of space forbid any attempt to give here an account of the origin and growth of the appellate jurisdiction of the House, for which the reader is referred to the Introduction to Denison and Scott, *Practice and Procedure of the House of Lords.* The jurisdiction was exercised from very early times, and can be traced back at least to the sixth year of Edw. I., 1278; though there would seem to have been no exercise of an equitable appellate jurisdiction until the reign of Charles the First (Denison and Scott, p. 37).

The true principle on which the jurisdiction of the House of Lords as an appellate tribunal is based is thus explained by Sir Matthew Hale in a passage cited in Denison and Scott, at p. 41:—

"Although that the English monarchy is not in all respects absolute and unlimited, but hath certain qualification of monarchical power, especially in point of making laws and imposing taxes upon the people, yet certainly, since the denomination of government is *ad plurimum*, the government is monarchical and not aristocratical or democratical. And hence it is that all jurisdiction in this realm, whether ecclesiastical or civil, is derived from the Crown; and that the exercise thereof in the ministers or judges to whom it is so delegated by the Crown, is in right of the Crown, and by virtue of a delegation from it. And it were a thing scarce consistent with the monarchical government that those sentences, judgments, or decrees which are given by the King's authority and commission, should be examined by an original jurisdiction lodged in the House of Lords, without especial authority given by the King by writ, commission, or endorsement. This were to make the basis of government aristocratical, since the last devolution of appeals would be from the King and the judgments given by his authority unto the Lords" (Hale, *Lords' Jurisdiction*, c. 32, p. 190).

From time to time various schemes were propounded for improving the jurisdiction or diverting it into other channels, which will be found stated in detail in Denison and Scott, pp. xlviii.-lix.

The Judicature Commissioners in their *First Report* (25th March 1869), though making no proposal upon the constitution of the House of Lords, considered as a Court of Appeal, as not being within the scope of

their commission, pointed out that it impaired the efficiency of the Court of Chancery during the session of Parliament by withdrawing the Lord Chancellor for the whole of four days in every week from his own Court.

The Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, which was based largely on the recommendations of the Commissioners, provided (s. 20) that no appeal should be brought from the High Court or the Court of Appeal to the House of Lords. By sec. 2 of the Supreme Court of Judicature Act, 1875, 38 & 39 Vict. c. 77, the operation of sec. 20 of the principal Act was postponed until the 1st Nov. 1876, and by sec. 24 of the Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, it was repealed.

Present Jurisdiction.—The present practice of the House of Lords in exercise of its appellate jurisdiction is now regulated by the Appellate Jurisdiction Act, 1876, as amended by the Appellate Jurisdiction Act, 1887, 50 & 51 Vict. c. 57. "By that Act the highest and most ancient Court of the realm, to which in every age the people have looked up with respect and confidence, has been preserved, but preserved with the alterations and improvements demanded by the necessities of the age in which we live. It is a measure placing the jurisdiction of this great Court upon its legitimate and true basis, which was deviated from during the political contests of the seventeenth century by the peers in suits of equity, receiving appeals addressed to themselves personally, instead of those appeals coming before them, as in the old form of writ of error, by way of reference or delegation from the Crown. In accordance with the constitutional maxim that the sovereign is the fountain of justice, the Act recognises the principle that the House of Lords sits in its judicial capacity as the adviser of the Queen—as the Court of Parliament administering justice in her name, a principle embodied in the wording of the petition by means of which an appellant can now alone approach their lordships. It leaves the House of Lords as before—the ultimate Court of Appeal for the United Kingdom; by the creation of legal peerages for life it guarantees that every appeal shall be heard by an adequate number of highly-trained and experienced judicial minds; and it enables the tribunal to sit throughout the judicial year. And, although the Lords strictly adhere to the Standing Orders and Regulations made for the transaction of judicial business, yet their system is sufficiently elastic to enable them, in this final resort of the suitor, to remove any formal or technical difficulty which might prevent right being done" (Denison and Scott, pp. lxi., lxii.).

From what Courts an Appeal Lies.—An appeal lies to the House of Lords from any judgment or order of the following Courts, viz.:—

(1) Of the Court of Appeal in England.

(2) Of any Court in Scotland from which error or an appeal lay to the House of Lords by common law or by statute before the commencement of the Act.

(3) Of any Court in Ireland from which error or an appeal lay to the House of Lords before the commencement of the Act (App. Jur. Act, 1876, s. 3).

A refusal by the Court of Appeal of leave to appeal is not an order or judgment within the meaning of the section from which an appeal lies (*Lane* v. *Esdaile*, [1891] A. C. 210).

The Judicature (Procedure) Act, 1894, s. 1 (1), which enacts that no appeal shall lie, without the leave of the judge or of the Court of Appeal,

from certain interlocutory orders or judgments made by a judge, has no application to appeals to the House of Lords from the Court of Appeal, and does not affect the section (*Ford's Hotel Co., Limited*, v. *Bartlett*, [1896] A. C. 1).

Scotch Appeals.—See Appellate Jurisdiction Act, 1876, ss. 12, 25. No appeal lies to the House of Lords from a decision of the Court of Session under Sched. II. s. 14 (*c*) of the Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37 (*Osborne* v. *Barclay, Curle, & Co.*, [1901] A. C. 269).

Irish Appeals.—See Appellate Jurisdiction Act, 1876, ss. 12, 25; Supreme Court of Judicature Act (Ireland), 1877, 40 & 41 Vict. c. 57, ss. 65, 86. No appeal lies to the House of Lords from an order of the Court of Appeal in Ireland upon appeal from an interlocutory order of the King's Bench Division (*Gosped* v. *Irish Land Commission* [1899], A. C. 435; *R.* v. *Barton*, [1902] A. C. 268).

Appeals under Divorce Acts.—By the Judicature Act, 1881, s. 9, it is provided that all appeals which, under 20 & 21 Vict. c. 85, s. 55, or under any other Act, might be brought to the full Court established by the first-mentioned Act should henceforth be brought to the Court of Appeal. The decision of that Court on any question arising under the Acts relating to divorce and matrimonial causes, or to the declaration of legitimacy, is final, except where the decision is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, or for a declaration of legitimacy, or upon a question of law on which the Court of Appeal gives leave to appeal. Save as aforesaid, no appeal lies to the House of Lords under the said Acts.

Appeals to the House of Lords must be brought within one month after the decision appealed against is pronounced by the Court of Appeal if the House of Lords is then sitting, or, if not, within fourteen days after the House next sits.

An appeal in a matrimonial cause lies only from the Court of Appeal (*Cleaver* v. *Cleaver*, 1884, 9 App. Cas. 631). An appeal lies to the House of Lords from an order of the Court of Appeal granting a new trial of a case tried by a jury, on whose finding a decree *nisi* has been made (*Butchart* v. *Butchart*, [1901] A. C. 266).

Bankruptcy Appeals.—An appeal lies from an order in bankruptcy of the Court of Appeal to the House of Lords, by leave of the Court of Appeal, but not otherwise (Bankruptcy Act, 1883, s. 104 (*E*)). As to the principles on which leave to appeal will be given, see *Ex parte Hayman, In re Pulsford*, 1878, 8 Ch. D. 11; *Ex parte Jackson, In re Bowes*, 1880, 14 Ch. D. 725; *Ex parte East and West India Dock Co., In re Clarke*, 1881, 17 Ch. D. 759; *Ex parte Allen, In re Fussell*, 1882, 20 Ch. D. 341.

There is no appeal to the House of Lords from an order of the Court of Appeal on appeal from a Divisional Court under sec. 2 of the Bankruptcy Appeals (County Courts) Act, 1884.

Appeals in Criminal Causes.—In England matters of a criminal nature could only be brought before the House of Lords by writ of error. [See ERROR, WRIT OF.] A writ of error lies for every substantial defect appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict (Archbold, *Pleading, Evidence and Practice in Criminal Cases*, 23rd ed.,

p. 279). The mode of bringing writs of error was regulated by numerous statutes (Denison and Scott, p. 3). Writs of error lay from the King's Bench Division to the Court of Appeal, but not from the Court of Appeal to the House of Lords; but there is, under the Appellate Jurisdiction Act, 1876, s. 3, an appeal from any order or judgment of the Court of Appeal, which includes the judgment of the Court of Appeal on a writ of error. The appeal is subject to the provisions of the last-named Act and the Standing Orders of the House. By sec. 10 the consent of the Attorney-General, or other law officer of the Crown, must be obtained, in any case where proceedings in error on an appeal could not hitherto have been had in the House of Lords without the fiat or consent of such officer (see Denison and Scott, pp. 3-6). For a case of an appeal from a judgment on a writ of error, see *Castro* v. *The Queen*, 1881, 6 App. Cas. 229.

Lords of Appeal.—The Lords of Appeal are the Lord Chancellor of Great Britain for the time being, the four Lords of Appeal in Ordinary (appointed under the provisions of the Appellate Jurisdiction Act, 1876, ss. 6, 14, for the purpose of aiding the House of Lords in the hearing and determination of appeals), and such peers of Parliament as are for the time being holding or have held any of the high judicial offices defined by sec. 25 of the Act.

An appeal cannot be heard unless not less than three of the above-mentioned persons are present (App. Jur. Act, 1876, ss. 5, 6).

As to the appointment, qualifications, pensions, and position of the Lords in Ordinary, see App. Jur. Act, 1876, ss. 6, 7, 14, and App. Jur. Act, 1887, s. 2.

Lay Peers.—In strictness the lay peers are entitled to vote on judicial questions, but in modern times this right is rarely, if ever, exercised. In the case of *Bradlaugh* v. *Clarke*, 1883, 8 App. Cas. 354, a lay peer took part in the hearing of a case, and voted (May's *Parliamentary Practice*, 10th ed., 1893, p. 341).

Power to Summon Judges.—The House of Lords has from very early times exercised the power of summoning the common law judges to assist them with their opinions on points of law. The judges are only so summoned in cases of extreme importance. See *O'Connell* v. *R.*, 1844, 11 Cl. & Fin. 155; 8 E. R. 1061; and the modern case of *Allen* v. *Flood*, [1898] A. C. 1. As to the functions of the judges when so summoned, see Denison and Scott, pp. 19-26.

Assessors in Admiralty Cases.—Under sec. 3 of the Judicature Act, 1891, the House of Lords may, for the purpose of aiding it in the hearing and determination of appeals in Admiralty actions, call in the aid of assessors, and hear the appeal with the assistance of such assessors.

Appeal Committee.—This tribunal, originally appointed in 1812, is reappointed at the commencement of each session, and deals with various interlocutory matters in connection with appeals, and reports on them to the House (Denison and Scott, pp. 28, 29).

Time for Hearing Appeals.—Appeals may be heard during the prorogation of Parliament (App. Jur. Act, 1876, s. 8) and, with the authority of the King, under his sign-manual, during the dissolution of Parliament (s. 9).

Procedure on Appeals to the House of Lords.—The practice on appeals to the House of Lords is governed by the Standing Orders of the

House, and by certain official directions, which are termed Directions for Agents. It is essential that the Standing Orders should be strictly complied with.

Time for Bringing an Appeal.—No appeal can be brought, unless otherwise provided by statute, after the lapse of one year from the date of the last decree, order, judgment, or interlocutor appealed from. In the case of infants, *femes coverts*, persons of unsound mind, prisoners, or persons absent from Great Britain and Ireland, the petition may be lodged within one year from the appellant becoming of full age, *discovert*, or *compos mentis*, or from the time of his leaving prison, or coming within the realm; but no longer time than five years from the date of the last order will be allowed on the ground of mere absence (Standing Order 1).

Where there is a competent appeal from an order made within the year, there is nothing in the Standing Orders or practice of the House to prevent it from entertaining an appeal from a previous order which is so connected with it as properly to form the subject of one and the same appeal, if the previous order is in an appealable condition, if it does not belong to a stage in the proceedings which has been definitely passed, or to a chapter in the litigation which may fairly be regarded as closed, and if it is clear that the appeal will not lead to additional inquiries and further expense (*per* Lord Macnaghten, *Concha* v. *Concha*, [1892] A. C. 670); and see *Attwood* v. *Small*, 1835, 6 Cl. & F. 232; 7 E. R. 684; 49 R. R. 115).

It is only on some extremely exceptional and extraordinary ground that the Standing Orders would be suspended (*Phillips* v. *Fothergill*, 1886, 11 App. Cas. 466).

Divorce appeals must be brought within one month of the decision of the Court of Appeal if the House is then sitting, or otherwise within fourteen days after it next sits (Jud. Act, 1881, s. 9).

Who may Appeal.—Any person properly made a party to an action in the Court below, and having a direct or some probable interest in such action, may appeal (*Rochfort* v. *Battersby*, 1849, 2 H. L. Cas. 388, at p. 406; 9 E. R. 1139; 81 R. R. 210). A person, though not a party below, may, under some circumstances, appeal (*Bailey* v. *Maule*, 1839, 7 Cl. & F. 121*n.*; 7 E. R. 1012; and other cases cited in Denison and Scott, p. 32). If a party in the Court below has not been made a party to the appeal, he may present a petition, praying to be added as a party (Standing Order No. 8). An objection for want of parties should be taken in the Court below (*Mullins* v. *Townsend*, 1831, 2 Dow & Cl. 430; 6 E. R. 787).

Counsel.—All counsel, whether of the English, Scotch, or Irish bars, have an equal audience before the House. Only two will be heard for each party (Denison and Scott, p. 33). All petitions of appeal must be signed, and their reasonableness certified, by two counsel who attended as counsel below, or purpose attending as counsel on the appeal (Standing Order No. 2). All printed cases must be signed by one or more of such counsel (Standing Order No. 5 (3)). Counsel are not as a rule heard before the Appeal Committee.

Mode of Bringing an Appeal.—Every appeal is brought by way of petition to the House, praying that the matter of the order or judgment appealed against may be reviewed before His Majesty the King in his Court of Parliament, in order that the Court may determine

what of right, and according to the law and custom of the realm, ought to be done in the subject-matter of such appeal (App. Jur. Act, 1876, s. 4).

Petition of Appeal.—A form of petition is given in the Standing Orders. It must be printed on parchment. Two clear days' notice of intention to present it, together with a correct copy of the appeal, must be served on the respondents or their solicitors, and a certificate of service entered on the appeal. The appeal, with four printed paper copies, may then be lodged in the Parliament Office. If the House be then sitting, and if not, on the next ensuing meeting of the House, the appeal will be presented to the House, and an order made requiring the respondents to lodge a printed case in answer to the appeal. The order, technically termed " the order of service," when received from the Judicial Office, must be served on the respondents, and returned with an affidavit of service entered thereon within the time granted to the appellant for lodging his printed case (*i.e.* within six weeks from the date of the presentation of appeal) (Standing Order No. 5). The several periods limited by the Standing Orders take effect from the date of the *presentation* of the appeal to the House, which is not necessarily that on which the appeal is *lodged* at the Parliament Office (Directions for Agents, 1, 2, 3, 4).

Security for Costs.—The appellant must give security for the costs of the appeal by recognisance to the amount of £500, and a bond for £200, or, in lieu of a bond, by payment into the Security Fund Account of the House of Lords of £200, within one week after the presentation of the appeal to the House (Standing Order No. 4; Directions for Agents, 5-13).

Pauper Appeals.—Petitions for leave to sue *in formâ pauperis* must be lodged within one week from the date of the presentation of the petition of appeal; in default the appeal will be dismissed. Under the Appeal (Formâ Pauperis) Act, 1893, 56 & 57 Vict. c. 22, if the House, on the report of the Appeal Committee, determines that there is no *primâ facie* case for the appeal, it may refuse the prayer of the petition for leave to appeal as a pauper, and accordingly appellants praying to sue *in formâ pauperis* are required to establish to the satisfaction of the Appeal Committee a *primâ facie* case. They must also lodge in the Judicial Department, as soon as possible after the presentation of the petition, a copy of the proceedings below, together with references to the reports, if any, of the cause in the Courts below (Directions for Agents, 16).

Where the petitioner sought as one of the public to establish a public right, and it appeared that subscriptions had been collected to assist the litigation, his appeal for leave to appeal as a pauper was refused (*Bowie* v. *Marquis of Ailsa*, 1887, 13 App. Cas. 371).

Preliminary Objections.—Objections that the appeal is incompetent or irregular will be disposed of before the Appeal Committee (*Attwood* v. *Small*, 1835, 6 Cl. & F. 232, at p. 280; 7 E. R. 704; 49 R. R. 115). See Denison and Scott, pp. 55-76.

Stay of Proceedings Below.—An appeal to the House of Lords does not operate as a stay of proceedings under the order of the Court below. Any application for a stay must be made in all cases, in the first instance, to the Court of Appeal (*The Khedive*, 1879, 5 P. D. 1; *Hamill* v. *Lilley*, 1887, 19 Q. B. D. 83). If the application is refused by the Court

of Appeal, it may, it seems, be renewed to the House of Lords (Denison and Scott, pp. 77-79).

The principle on which the Court acts in granting a stay is that the appeal, if duly prosecuted to a successful termination, shall not prove nugatory (*Wilson* v. *Church*, 1879, 12 Ch. D. 454; *Polini* v. *Gray*, 1879, 12 Ch. D. 438; *Emerson* v. *Ind, Coope & Co.*, 1886, 34 W. R. 778). Acting on this principle, the Court will, in a proper case, even where an action has been dismissed, grant an injunction to restrain the parties from parting with the property pending an appeal (*Polini* v. *Gray*, *ubi sup.*).

There is an absolute discretion in the Court as to the terms it will impose as the price for a stay (*A.-G.* v. *Emerson*, 1889, 24 Q. B. D. 56), and accordingly it can no longer be considered as settled practice that in all cases the Court will require an undertaking from the solicitor of the respondent to refund, if the appeal is successful, the costs paid to him (as in *Merry* v. *Nickalls*, 1873, L. R. 8 Ch. 205; *Wilson* v. *Church*, 1879, 12 Ch. D. 454; and other earlier cases). There is no such hard-and-fast rule; each case must depend on its own special circumstances (*A.-G.* v. *Emerson*, *ubi sup.*; *Schwepps, Limited*, v. *Gibbens*, 1904, W. N. 208; and see *Russell* v. *Russell*, 1895, 73 L. T. 569).

Inasmuch as a stay of proceedings is an indulgence, the costs are usually ordered to be paid by the applicant (*Merry* v. *Nickalls*, *ubi sup.*; *Grant* v. *Banque Franco-Egyptienne*, 1878, 3 C. P. D. 202); though here, too, there is a discretion in the Court (*Burdick* v. *Garrick*, 1870, L. R. 5 Ch. 455; *Adair* v. *Young*, 1879, 12 Ch. D. 136).

Appearance by Respondents.—The solicitors for respondents intending to lodge printed cases in answer to the appeal should attend at the Parliament Office to ascertain the due execution of the recognisance and bond, and enter their names in the appearance-book (Directions for Agents, 17).

Printed Cases.—Printed statements, called "cases," are prepared by both sides, for the purpose of informing the Lords as to the points in controversy. The case is prepared by counsel, and must be signed by him. It must contain all material facts, and should concisely narrate the proceedings, and the substance of the pleadings and evidence, or proofs, whether consisting of documents or depositions (Dan. *Ch. Pr.*, 7th ed., p. 1087; Denison and Scott, pp. 80-87).

Appendix.—The appellant has to lodge with his printed case a printed appendix, consisting of such documents, or parts thereof, used in evidence in the Court below, as may be necessary for reference on the argument of the appeal in support of his case (Directions for Agents, 23). He must, as soon as possible after the presentation of the appeal, furnish to the respondent a list of the proposed documents, and in due course a proof copy of the appendix. The proof must be examined by the solicitors of the parties with the original documents. Ten copies of the appendix must be delivered to the respondent, who may print any additional documents used in evidence in the Court below which may be necessary for the support of his case. The costs of printing the appendix are, in the first instance, borne by the appellant, and of the additional documents by the respondent (Directions for Agents, 23, 24, 25). As to form of the case and appendix, see Directions for Agents, 27, 28.

Time for Lodging Cases.—In English appeals six weeks, and in Irish

and Scotch appeals eight weeks, are allowed from the date of the presentation of the appeal to lodge the printed cases and appendix. The time may be extended by order on petition. Where the time expires during the recess of the House, the period is extended to the third sitting day of the next ensuing meeting of the House (Directions for Agents, 21; Standing Orders 5 and 7).

If the appellant fails to lodge his case and appendix within the time his appeal will be dismissed (Standing Order, No. 5). A respondent can only be heard at the Bar upon lodging a printed case; if he fails to lodge within the proper time, the appeal may be set down to be heard *ex parte* (Directions for Agents, 30).

Forty copies of the case and appendix, and ten special copies for the use of the Lords, must be lodged in the Parliament Office (Directions for Agents, 29).

Exchange of Cases.—After lodgment of the printed cases, the respective cases must be exchanged at the offices of the solicitors (Directions for Agents, 32).

Setting Down Appeal.—Either party *may* set down the cause for hearing as soon as the printed cases of all parties and the appendix thereto have been lodged, but it is *obligatory* on the appellant, upon the lodgment of his printed cases and appendix, to set down the cause within the time limited by Standing Order No. 5. The important date to remember is the date of the *presentation* of the appeal to the House, from which date the time limited runs. The cause must, in English causes, be set down for hearing on the first sitting day after the expiration of six weeks from the date of the *presentation* of the petition to the House; in Scotch and Irish appeals, after the expiration of eight weeks from the same date (Directions for Agents, 33; Standing Orders, No. 5).

The Hearing.—On the hearing of an appeal the agents for the parties must have the originals (or such copies thereof as were accepted in evidence in the Court below) of all documents set out in the case and appendix in readiness below the Bar, in case the House desires to refer to them (Directions for Agents, 35).

Where no party appears when the appeal is called on for hearing, it will be dismissed without costs on either side (*Sherburne* v. *Middleton*, 1842, 9 Cl. & Fin. 72; 8 E. R. 343). As to the course to be followed, when the appellant does not, and the respondent does, appear, see the cases cited, Denison and Scott, pp. 99-102.

Evidence.—As a rule the House will only look at the evidence used in the Court below (*Attwood* v. *Small*, 1838, 6 Cl. & F. 232; 7 E. R. 684; 49 R. R. 115; *Banco de Portugal* v. *Waddell*, 1880, 5 App. Cas. 161); and will not allow new questions of fact to be raised (*Huxley* v. *West London Extension Railway Co.*, 1889, 14 App. Cas. p. 39). Under very exceptional circumstances, the cause may be remitted for re-hearing on fresh evidence (*Woodward* v. *Goulstone*, 1885, 11 App. Cas. 469). See further, as to evidence, Denison and Scott, pp. 109-116.

Point not Raised Below.—When a question of law is taken in the House of Lords for the first time upon the construction of documents before the House, or upon facts admitted or proved beyond controversy, it is not only competent, but expedient, in the interests of justice, to entertain the plea (*per* Lord Watson, *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A. C. 480); and see *Cooper* v. *Cooper*, 1888, 13 App.

Cas. 88. If the decision of the Court of Appeal is found by the House of Lords to have been based on a point not suggested at the trial in the original Court, the House will reverse the decision of the Court of Appeal and restore that of the Court of First Instance (*The Tasmania*, 1890, 15 App. Cas. 223; and see *Smith* v. *Baker*, [1891] A. C. 325).

The Judgment.—As to the mode in which the judgment of the House is given, see Denison and Scott, pp. 116, 117. The judgment is embodied in an order in the form mentioned on page 118 of the same work. The draft is issued and considered by the parties, and objections raised by either side are dealt with by the Clerk of the Parliaments, and, if necessary, referred by him to the Lord Chancellor or one of the law lords who attended the hearing. When finally settled, a fair copy, signed by the Clerk of the Parliaments, is issued to the successful litigant. The judgment is recorded in the journals of the House, and printed copies supplied to the agents requiring them (Denison and Scott, pp. 118, 119).

The House can enter judgment and make such order as ought to have been made by the Court below (*Ibo Syndicate* v. *Wyler*, 1902, 51 W. R. 320).

A judgment of the House, when once pronounced in any particular case, is conclusive in that case (Denison and Scott, p. 126); and "the weight of authority is strongly in favour of the view that the decision of the House is conclusive, not only in the particular case in which it is pronounced, but also on the point of law it decides; and that all subsequent cases must be governed by it" (*ibid.* p. 132; and see *London Street Tramways Co.* v. *London County Council*, [1898] A. C. 375). A decision of the House, the Lords being equally divided, is as binding upon the House itself, and upon all inferior Courts, as if it had been pronounced *nemine dissentiente* (*Att.-Gen.* v. *Dean of Windsor*, 1860, 8 H. L. C. 369; 11 E. R. 472; *Beamish* v. *Beamish*, 1861, 9 H. L. C. 274; 11 E. R. 735). See further, as to the finality of a judgment of the House, Denison and Scott, pp. 119-133.

Power to Correct Errors in a Judgment.—As to the power of the House to correct and amend the form of its judgment where there has been mistake in drawing it up, see Denison and Scott, p. 133.

Making Judgment of the House an Order of the Court Below.—Where the House reverses or varies the order appealed from, its judgment should be made an order of the Court below (*Att.-Gen.* v. *Scott*, 1749, 1 Ves. Sen. 413; 27 E. R. 1113). The application may be made *ex parte* to the Court of First Instance where the judgment appealed from was originally made (*British Dynamite Co.* v. *Krebs*, 1879, 11 Ch. D. 448). See Dan. *Ch. Pr.*, p. 1095; Dan. *Ch. Forms*, p. 756; Seton, p. 882; Chitty's *Forms*, p. 510.

Costs.—See on this subject Denison and Scott, pp. 141-174; *The Annual Practice*, 1906, vol. ii., p. 703. The House has jurisdiction over the costs of all appeals to it (*Manchester, Sheffield and Lincolnshire Railway Co.* v. *Doncaster Guardians*, [1897] 1 Q. B. 117); and it can award costs in the Court below (*Guardians of West Ham* v. *Churchwardens of S. Matthew, Bethnal Green*, [1896] A. C. 477). The usual rule is that the successful party gets the costs of the appeal (*Peck* v. *Gurney*, 1873, L. R. 6 H. L. 413), even though the votes of the House are divided (*Hopkinson* v. *Rolt*, 1861, 9 H. L. C. 555; 11 E. R. p. 846). If the votes of the House are equal on the question that the

order appealed from be reversed, the judgment below is affirmed, but without costs (*Pryce* v. *Monmouthshire Railway Co.*, 1878, 4 App. Cas. 197, *q.v.* for the reasons for the rule; and see *Paquin Limited* v. *Beauclerk*, [1906] A. C. 148).

Pauper Costs.—On the taxation of the costs of a pauper appellant to whom the costs of an appeal have been awarded, the fees of the House and of counsel are disallowed, and the solicitor has his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, etc. (*Johnson* v. *Lindsay*, [1892] A. C. 110). It is not, however, the rule to award costs in a pauper case (*Wyman* v. *Paterson*, [1900] A. C. 271). There is no rule or practice of the House of Lords regulating the liability of a pauper appellant for costs as between him and his solicitor. A pauper is therefore liable to pay costs as much as any other litigant (*In re Raphael, Ex parte Solomon*, [1899] 1 Ch. 853).

Taxation of Costs.—See Standing Order, No. 10.

Appeal as to Costs.—An appeal as to costs only is incompetent (*Caledonian Railway Co.* v. *Barry*, [1903] A. C. 126).

Cross Appeals.—Cross appeals must be presented to the House within the period allowed for lodging cases on the original appeal (Standing Orders, No. 6). As to such time, see *supra*, p. 410.

Separate printed cases have to be presented to the House. As a rule no security for costs is required. Otherwise cross appeals are subject to the Standing Orders applicable to appeals generally.

[See further, as to appeals to the House of Lords, Denison and Scott, *Practice and Procedure*, 1879; Daniell's *Chancery Practice*, 7th ed., 1901, pp. 1082-1100; Daniell's *Chancery Forms*, 5th ed., 1901, pp. 737-759; Seton's *Judgments and Orders*, 6th ed., 1901, pp. 878-883; Chitty's *Archbold's Practice*, 14th ed., 1885, pp. 995-1013; Chitty's *King's Bench Forms*, 13th ed., pp. 495-510; *The Annual Practice*, 1906, vol. ii. pp. 700-725].

THE FOLLOWING TABLE, ARRANGED ALPHABETICALLY, MAY BE FOUND USEFUL, AS SHOWING TO WHAT COURT AN APPEAL LIES IN EACH OF THE SEVERAL CASES SPECIFIED.

TABLE OF APPEALS.

FROM WHAT COURT OR PERSON.	TO WHAT COURT.	HOW AUTHORISED.	OBSERVATIONS.
Admiralty, In—			
Judge of High Court . . .	Court of Appeal	Jud. Act, 1873, ss. 18 (5), 19	
Judge in Chambers . . .	Court of Appeal	Jud. Act, 1873, s. 50	Subject (1) to provisions of Judicature Act, 1873, s. 50, requiring a motion to discharge the order, unless by special leave; and (2) to provisions of Judicature Act, 1894, s. 1, limiting the right of appeal.
Divisional Court	Court of Appeal, by leave	Jud. Act, 1873, s. 49	
Registrar	Judge in Chambers	Order 54, r. 21	See *In re Patrick*, 1889, 14 P. D. 42.
County Court, or other inferior Court exercising Admiralty jurisdiction . .	Divisional Court of P. D. and A. Div.	Jud. Act, 1873, s. 45; County Courts Act, 1888, s. 120; or under County Courts Admiralty Jurisdiction Acts, 1868 and 1869	
Agricultural Holdings Act, 1900, Under—			
County Court judge, on case stated by arbitrator on question of law . . .	Court of Appeal	63 & 64 Vict. c. 60, s. 2 (6); Order 58, r. 20	

TABLE OF APPEALS—(*Continued*).

From what Court or Person.	To what Court.	How Authorised.	Observations.
Arbitrator or Referee on reference under Arbitration Act, 1889	In Ch. D. to Judge to whom the action is assigned In K. B. D. to Divisional Court	52 & 53 Vict. c. 49, s. 14; Order 36, r. 52; Order 40, r. 6	See *Wynne-Finch* v. *Chayter*, [1903] 2 Ch. 475. Appeal lies without leave from judge in Ch. D. or Divisional Court in K. B. D. to Court of Appeal.
Bankruptcy, In—			
High Court	Court of Appeal	Bankruptcy Act, 1883, 46 & 47 Vict, c. 53, s. 104 (*b*)	No appeal to House of Lords without leave.
County Court	Divisional Court in Bankruptcy	Bankruptcy Appeals (County Courts Act, 1884, 47 Vict. c. 9, s. 2)	No appeal to Court of Appeal without leave.
Chancery Division—			
Judge of High Court . . .	Court of Appeal	Jud. Act, 1873, s. 19	
Judge at Chambers . . .	Court of Appeal	Jud. Act, 1873, s. 50	Subject to provisions of Judicature Act, 1873, s. 50, requiring a motion to discharge the order, unless by special leave. [see *Boake* v. *Stevenson*, [1895] 1 Ch. 358]; and to provisions of Judicature Act, 1894, s. 1, limiting the right of appeal.
County Courts	Divisional Court	Jud. Act, 1873, s. 45; County Courts Act, 1888, s. 120	No appeal to Court of Appeal without leave.
Court of Appeal	House of Lords	Appellate Jurisdiction Acts, 1876, 1887	
Divorce, In	House of Lords	Jud. Act, 1881, s. 9	
District Registrar—			
K. B. D.	Judge in Chambers	Order 35, r. 9	

Ch. D.	Judge to whom the action is assigned	Order 35, rr. 9, 12	
Divisional Court	Court of Appeal	Jud. Act, 1873, s. 45; Jud. Act, 1894, s. 1 (5)	Leave to appeal is required.
Divorce—			
Judge of High Court . . .	Court of Appeal	Jud. Act, 1881, s. 9	Limited right of appeal to House of Lords.
After trial by jury . . .	Court of Appeal	Jud. Act, 1890, s. 1	See *Wilkins* v. *Wilkins*, [1896] P. 108.
After trial without jury .	Divisional Court of P. D. and A. Div.	Divorce Rules, r. 62	See *Smith* v. *Smith*, [1897] P. 293.
Judge at Chambers . . .	Court of Appeal	... ...	Subject to same rules as apply to appeals from judge in chambers in Ch. D. (*In re Smith; Rigg* v. *Hughes*, 1884, 9 P. D. 68).
Registrar	Judge at Chambers	Order 59, r. 21	
Justices, under Summary Jurisdiction (Married Women) Act, 1895	Divisional Court of P. D. and A. Div.	58 & 59 Vict. c. 39, s. 11; Order 59, r. 4A	
Order of Committal, From .	Divisional Court of K. B. D., by way of special case	58 & 59 Vict. c. 39, s. 9	See *Ruther* v. *Ruther*, [1903] 2 K. B. 270.
Durham Palatine Court . . .	Court of Appeal	Palatine Court of Durham Act, 1889, 52 & 53 Vict. c. 47, s. 11	
Ecclesiastical Cases, In . . .	Judicial Committee of Privy Council	Appellate Jurisdiction Act, 1876, s. 14	
Election Petition, As to . . .	Divisional Court of K. B. D.	Jud. Act, 1881, s. 14; Order 59, r. 1 (*b*)	No appeal to Court of Appeal without leave.
Indian and Colonial Courts . .	His Majesty in Council		
Inferior Courts	Divisional Court	Jud. Act, 1873, s. 45; Jud. Act, 1894, s. 1 (5)	No appeal to Court of Appeal without leave.

From what Court or Person.	To what Court.	How Authorised.	Observations.
King's Bench Division—			
Judge of High Court . . .	Court of Appeal	Jud. Act, 1873, s. 19	
After trial by jury . . .	Court of Appeal on motion for new trial	Jud. Act, 1890, s. 1 ; Order 39, rr. 1A, 3, 4, 5	
After trial without jury .	Court of Appeal	Jud. Act, 1873, s. 19 ; Order 58	
Judge at Chambers . . .	Divisional Court (except in matters of practice and procedure)	Jud. Act, 1873, s. 50 ; Jud. Act, 1894, s. 1 (4) ; Order 54, r. 23 ; Order 59, r. 1 (*i*)	
	Court of Appeal in matters of practice and procedure	Jud. Act, 1894, s. 1 (4) ; Order 54, r. 23	
Master	Judge at Chambers	Order 54, r. 21	
Lancaster Palatine Court . .	Court of Appeal	Jud. Act, 1873, s. 18 (2) ; Chancery of Lancaster Act, 1890, 53 & 54 Vict. c. 24	Appeal lies to House of Lords.
Liverpool Court of Passage .	Court of Appeal	Liverpool Court of Passage Act, 1893, 56 & 57 Vict. c. 37, s. 10	See *Anderson* v. *Dean*, [1894] 2 Q. B. 222 ; *Coates* v. *Moore*, [1903] 2 K. B. 140.
Lord Mayor's Court	Divisional Court	Jud. Act, 1873, s. 45	See *Appeford* v. *Judkins*, 1878, 3 C. P. D. 489.
Lunacy, In	Court of Appeal	Jud. Act, 1873, s. 18 (5)	
Patents, In Relation to, Comptroller, from	Law Officer	Patents, etc., Act, 1888, 51 & 52 Vict. c. 50, s. 2, amending Patents, etc., Act, 1883, 46 & 47 Vict. c. 57, s. 7	
Petty Sessions	Divisional Court, on case stated	Jud. Act, 1873, s. 45 ; Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 33 ; Summary Jurisdiction Rules, 1886, r. 18	

Prize Court	His Majesty in Council	Naval Prize Act, 1864, 27 & 28 Vict. c. 25; Jud. Act, 1891, s. 4	
Probate—			
Judge of High Court . . .	Court of Appeal	Jud. Act, 1873, s. 18 (5)	
Judge at Chambers . . .	Court of Appeal	Jud. Act, 1873, s. 50	Subject to same conditions as an appeal from judge at Chambers in C. D. (*In re Smith; Rigg* v. *Hughes*, 1884, 9 P. D. 68).
Registrar	Judge at Chambers	Order 54, r. 21	
Quarter Sessions	Divisional Court, on case stated	Jud. Act, 1873, s. 45; Jud. Act, 1894, s. 2	
Railway Commissioners . . .	Court of Appeal	Railway and Canal Traffic Act, 1888, 51 & 52 Vict. c. 25, ss. 17 (2), 55	
Revenue Cases, In	Single judge of K. B. D.	Jud. Act, 1873, s. 16; and see the several statutes cited under *Appeals in Revenue Cases, supra*	Except in the case of the Finance Act, 1894, where no appeal lies without leave, there is an appeal to Court of Appeal from Order of the Revenue judge.
Trade Mark, In relation to, Comptroller-General, from .	Board of Trade	Patent, etc., Act, 1883, ss. 62 (4), 69 (3)	Board of Trade may refer to High Court (Patent Act, 1883, ss. 62 (5), 69 (4)).
Workmen's Compensation Act, 1897, Under—			
County Court judge, on case stated by arbitrator on question of law . . .	Court of Appeal	60 & 61 Vict. c. 37, Sched. 2 (4); Order 58, r. 20	

Further information on the subject of appeals will be found under the following heads:—

For Criminal Appeals, see CROWN CASES RESERVED; ERROR, COURT OF; VENIRE DE NOVO.
For Election Appeals, see ELECTION COMMISSIONERS; ELECTION PETITION.
For Licensing Appeals, see LICENSING.
For Appeals from Comptroller of Patents, see PATENTS.
For Appeals from Petty Sessions, see PETTY SESSIONS.
For Appeals to the Privy Council, see PRIVY COUNCIL.
For Poor Law Appeals, see POOR; POOR LAW.
For Appeals to and from Quarter Sessions, see QUARTER SESSIONS.
For Rating Appeals, see RATING.
For Registration Appeals, see REGISTRATION OF VOTERS; REVISING BARRISTER.
For Appeals from Comptroller to Board of Trade, with reference to the registration of Trade Marks, see TRADE MARKS.

[*Authorities.*— *The Annual Practice*, 1906; *The Annual County Courts Practice*, 1906; Browne and Powles on *Divorce and Matrimonial Causes*, 7th ed., 1905; Chitty's *Archbold's Practice*, 14th ed., 1885; Chitty's *King's Bench Forms*, 13th ed., 1901; Daniell's *Chancery Practice*, 7th ed., 1901; Daniell's *Chancery Forms*, 5th ed., 1901; Denison and Scott on *Practice and Procedure of the House of Lords*, 1879; Daubarn on *Employers' Liability*, 2nd ed., 1903; Fraser's *Law of Parliamentary Elections and Election Petitions*, 1906; Lely and Aggs' *Agricultural Holdings*, 1901; May's *Parliamentary Practice*, 10th ed., 1893; Powles and Oakley on *Probate*, 3rd ed., 1892; Rogers on *Elections*, 16th ed., 1897; Seton's *Judgments and Orders*, 6th ed., 1901; Williams's *Bankruptcy Practice*, 8th ed., 1904; Williams and Bruce on *Admiralty Practice*, 3rd ed., 1902.]

Appearance.

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1. *Effect of.*—The term "appearance" as applied to legal proceedings has a somewhat different meaning now from that which attached to it in former times. Originally it signified the personal attendance of the defendant, in obedience to the mandate of the Sovereign contained in the writ or bill issued against the defendant, and the giving of substantial bail to cover the amount in dispute. Now it signifies merely the placing on the records of the Court by the defendant, or some other person on his behalf, with his authority, of a notification of his intention to dispute the plaintiff's claim, and of his place of residence and address at which documents may be served on him. But the principle on which the modern practice is based is the same now as it was in former times. Appearance involves a submission to the jurisdiction of the Court, and

it provides the Court with an address where the defendant may be served with proceedings in the action. Through all the changes which have occurred in procedure during the last century the Court has held tenaciously to these two salient features of a defendant's appearance to a suit or action against him; the first of which is, however, qualified—as it has always been—by the recognised right of a defendant on first appearing to question the jurisdiction of the Court, or the validity of the originating process, or its service on him. Thus it is that an appearance entered without condition or protest is held to be an unconditional submission to the jurisdiction of the Court, which cannot afterwards be questioned, and constitutes a waiver of any irregularity in the writ or service thereof (*Re Orr-Ewing*, 1882, 22 Ch. D. 456, C. A.; *Mulckern* v. *Doerks*, 1884, 53 L. J. Q. B. 526; and see R. S. C., Order 70, r. 2). Thus it is also that, when once a solicitor has appeared on the record for a party, the Court will not release him from the duty of acting as the recognised recipient of documents served on his client, unless the name of another solicitor, or of the client in person, has been substituted on the record, and another address for service given (*De Mora* v. *Concha*, 1887, W. N. 194; *Re Seymour*, referred to, 1889, 34 Sol. Jo. 361; *Callow* v. *Young*, 1886, 55 L. T. 543).

2. *Conditional or under Protest.*—As stated above, the Court recognises the right of a defendant on entering his appearance to reserve to himself the right to dispute the jurisdiction, or question the validity of the proceedings. He may either do this before appearance by motion on notice, R. S. C., Order 12, r. 30, or he may enter a conditional appearance (or appearance under protest) by leave of a master, and afterwards apply to set aside the writ or service. Such an appearance is a complete appearance to the writ subject only to the condition, and becomes unconditional, unless the defendant applies within ten days (or such longer time as the master may fix in giving leave) to set aside the writ or service thereof. During the ten days, or other time allowed, the plaintiff is barred from taking any step based on the appearance, such, for example, as issuing a summons under Order 14. The form of this appearance runs: "Enter conditional appearance [*or* appearance under protest] for the defendant [*name or names*] without prejudice to an application to set aside the writ [*or* service of the writ]." As to appearance under protest by a partner in a firm, see 5, *infra*.

3. *Mode of Entering.*—Appearances are entered either at the central office, or, if the writ was issued at a district registry, at the office of such registry. If any defendant to an action commenced in a district registry resides or carries on business within the limits of the registry, he must appear at the district registry. If he neither resides nor carries on business within the registry, he may either appear at the district registry, or in London (Order 12, rr. 4, 5). If he appears in London his appearance operates to remove the action to London.

A defendant is bound by the terms of Order 12, r. 9, on the day he appears, to give notice to the plaintiff by sending to his address for service the sealed duplicate of the appearance piece. If the action was commenced in a district registry, and the defendant appears in London, such notice must be sent by prepaid post letter to the Plaintiff's address for service within the district registry. If he fails to do this, or sends the notice elsewhere, and judgment in default is entered in the district registry, the Court will not set such judgment aside (*Smith* v. *Dobbin*,

1877, 3 Ex. D. 338). In London actions, failure to give notice does not place the defendant in default.

A defendant must appear in his right name, even if wrongly sued in the writ, and a female defendant should in all cases be described as "spinster," "widow," or "the wife of ——." A divorced woman may be described as "a feme sole."

Since pleadings can now only be delivered pursuant to order (see DIRECTIONS, SUMMONS FOR), it no longer serves any purpose for a defendant by his appearance to demand a statement of claim.

The appearance piece must, in addition to the address of the solicitor or party entering it, also contain an address for service, which in London actions must be within three miles from the principal entrance to the Central Hall of the Royal Courts of Justice; and, where appearance is entered in a district registry, must be within the district.

In an action for recovery of land, a person not a party to the action may, by leave, appear and defend as landlord in proof that he is in possession of the land by himself or his tenant (Order 12, r. 25).

A defendant may enter an appearance immediately the writ is issued, without waiting to be served; but this does not apply to a person brought in as a defendant by counter claim (*Fraser* v. *Cooper*, 1883, 23 Ch. D. 685).

4. *By Persons under Disability.*—A lunatic so found by inquisition must appear by his committee. A person who, though not of unsound mind, is, from age or infirmity, incapable of managing his affairs, and in respect of whom an order in lunacy has been made appointing a receiver with powers of a committee over his property, must appear by such receiver. A person of unsound mind, not so found by inquisition, appears by a guardian *ad litem* appointed by order after an ordinary appearance has been entered, by a solicitor on his behalf.

An infant appears by his guardian *ad litem* acting by a solicitor. Form: "Enter appearance for *G. H.*, an infant, by *E. F.*, his guardian *ad litem*." The solicitor who enters the appearance must file an affidavit by himself, testifying to the fitness of the guardian, and that he has no interest adverse to that of the infant. The consent of the guardian to act must also be filed. A guardian *ad litem* cannot appear in person on behalf of an infant, but must employ a solicitor (R. S. C., Order 16, rr. 16-19). An infant on coming of age may, by notice filed at the central office or district registry, as the case may be, either adopt the appearance entered for him, or appoint another solicitor to act for him.

5. *By Firms and Corporate Bodies.*—In an action against a firm in the firm's name, the partners must appear individually in their own names, describing themselves as partners in the firm sued. A person who has been served as a partner may appear under protest, denying that he is a partner. Form: "Enter appearance for *G. H.*, a person served as a partner, but who denies that he is a partner, in the defendant firm." This denial of partnership operates to nullify the service on him as a partner, and also the service on the firm, so far as that particular service is concerned, but no further. If the plaintiff has in addition served the writ on the person in control of the business, or has served with the writ a notice that the person served is so served as a partner, and also as the person in control, the appearance, with denial of partnership, is no impediment to judgment in default against the firm, if no appearance is entered by any person as a partner (R. S. C., Order 48A, rr. 5-7).

A proprietory club may be sued as a firm, and the proprietors may appear as partners. See *Firmin* v. *International Club*, 1889, 5 T. L. R. 612, 694. But this does not apply to a members' club, which is not a legal entity (*Grossman* v. *The Granville Club*, 1884, 28 Sol. Jo. 518).

A corporate body, such as a limited company, or any recognised society of persons registered under Act of Parliament and capable of owning property and administering funds, such as a registered Trade Union (*Taff Vale Rly. Co.* v. *Amalgamated Society of Rly. Servants*, [1901] A. C. 426), can be sued and appear in its registered name. It must, however, appear by a solicitor, and cannot appear in person by its chairman or other officer not being a solicitor (*Re London County Council and London Tramways Arbitration*, 1897, 13 T. L. R. 254).

6. *By Public Bodies or Trading Concerns Unincorporate.*—Unincorporate bodies and institutions, such as hospitals, charitable institutions, building societies not registered under the Building Societies Act, 1874, and industrial and provident societies not registered under the Friendly Societies Act, 1896, are not legal entities and cannot be properly sued under their adopted titles, and cannot so appear. Some of these public bodies have, by the rules under which they have respectively constituted themselves, a rule appointing one or more of their officers to sue and be sued on their behalf. In such cases, appearance must be entered by such appointed officers on behalf of the society. In the absence of any such provision it is usual to permit two or three of the prominent officers, such as the chairman, treasurer and secretary, to appear in their own names and titles as officers on behalf of the society or institution.

7. *Probate and Admiralty.*—Appearances in actions in Probate and Admiralty actions are entered at the central office or the district registry.

In Probate actions the same solicitor cannot appear on both sides, except by leave of the judge.

In an Admiralty action *in rem*, a person claiming to intervene can appear on first filing at the Admiralty Registry an affidavit stating that he is interested in the *res* under arrest or the fund in the registry.

8. *Amending or Setting Aside.*—An appearance may be amended by leave of a master on consent of the plaintiff. If it has been entered by mistake, without instructions, and the plaintiff consents to its withdrawal, the master may give leave for it to be withdrawn.

Where the address for service on the appearance is illusory or fictitious, or for other sufficient reason, the plaintiff may apply, in the Chancery Division by motion or summons, and in the King's Bench Division *ex parte* on an affidavit of facts, to set the appearance aside. The master in King's Bench may direct a summons to issue, in which case he should be asked to direct the place and mode of service of the summons (R. S. C., Order 12, r. 12; Chitty's *Forms*, 13th ed., p. 73).

9. *Appearance after Judgment.*—A defendant may appear at any time before judgment, but if he appears at any time after the time limited by the writ, he is not entitled, unless otherwise ordered, to any further time for defence, or any other proceeding, than if he had appeared according to the writ. He can only appear after judgment by leave obtained in the Chancery Division by special motion or summons (Daniell's *Chancery Practice*, 7th ed., 299), and in the King's Bench Division by summons before a master.

As to the penalty for breach by a solicitor of his undertaking to enter an appearance, see ACCEPTANCE OF SERVICE; and as to the effect of non-appearance by a defendant, see DEFAULT IN PROCEEDINGS IN THE HIGH COURT.

Appendant and Appurtenant.—The words *appendant* and *appurtenant* are commonly used as predicates to denote the connection between a principal hereditament and another hereditament which is said to be appendant or appurtenant thereto, and is sometimes styled the adjunct or the accessory: the connection between them being such that, in general, a conveyance of the principal carries with it the adjunct without specific mention of it in the grant. See ACCESSION OF PROPERTY. Things appendant can be claimed by prescription (*q.v.*) only; that is to say, the grant under which they are presumed to have arisen is by hypothesis prior to the origin of legal memory; whereas things appurtenant can be claimed either by prescription or by express grant (Co. Litt. 121*b*; *Sacheverill* v. *Porter*, 11 Car. I.; Cro. (3), 482). ["That which is legally appendant or appurtenant passes by the conveyance of the principal without the words 'with the appurtenances,' or the like, Shep. Touch. 89; Co. Litt. 121" (Norton on *Deeds*, 250). General words expressly including rights appertaining or reputed to appertain to the subject-matter of the conveyance were, however, in almost universal use in conveyances until the Conveyancing Act, 1881, s. 6, rendered them unnecessary. "Appurtenances," it must be remembered, is construed according to its strict legal meaning (see *Birmingham, etc., Banking Co.* v. *Ross*, 1888, 38 Ch. D. 308; *Re Peck*, [1893] 2 Ch. 315; Stroud, *Jud. Dict.*), so that the word will not pass; for example, easements, the subject of grant *de novo*.] As a general rule, the principal hereditament and the adjunct thereto cannot be both corporeal or both incorporeal (Co. Litt. 121*b*; *Tyrringham's Case*, 26 & 27 Eliz. 4 Rep. 36). But Hargrave has observed that this rule is not of universal application to things appurtenant (Co. Litt. 121*b*, n. 7). There must be a propriety of relation, styled in the old books an "agreement in quality," between the two, making them suitable to be enjoyed together; for example, common of estovers cannot be appurtenant to land without a house; nor can common of pasture be appurtenant to a house without land; because in such case the principal does not admit of the appropriate use of the adjunct. For further information, see heads under which classes of appendant and appurtenant hereditaments are separately discussed, such as COMMON; ADVOWSON.

Appertaining is generally equivalent to appurtenance. There is, however, a difference between the devise of a house and the appurtenances, and of a house with the lands appertaining thereto—by the latter expression *some* lands being intended, the primary sense of appertaining being excluded (1 Jarm. *Wills*, 5th ed., 782). See APPENDANT AND APPURTENANT.

Apply, Liberty to.—The words "Liberty to Apply" have a well-known meaning, and in a judgment or order, when drawn up, they are amplified as follows:—"And any of the parties are to be at liberty to apply [to this Court *or* in chambers] as they shall be advised," or "And let any of the parties be at liberty to apply in chambers for the

appointment of a receiver [*or otherwise as the case may be*], and otherwise (generally) to apply as they may be advised."

It is often impossible in the Chancery Division to decide all the points in which existing parties are interested until a future period. If the income of a fund belongs to A. for life, the fund itself being distributable on his death among a certain class, the Court directs the income to be paid to A. for life, and that on his death the parties interested in the fund shall have liberty to apply. The final nature of the judgment remains, but persons having an interest under it may apply in a summary manner, without again setting the case down. The addition of the words "liberty to apply" does not enable the Court to deal with matters which do not arise in the course of working out the judgment (*Poisson* v. *Robertson*, 1902, 50 W. R. 260). In the Court of Chancery, the application under the reservation was made by petition or motion, and after 15 & 16 Vict. c. 80, s. 26, sometimes by summons in chambers, where such liberty was expressly given (*Winkworth* v. *Winkworth*, 1863, 32 Beav. 233; 55 E. R. 92). In the Chancery Division, liberty to apply in chambers is often given, and sometimes in lieu of a second further consideration (*Gilbert* v. *Russell*, 1875, W. N. 225). "All orders of the Court carry with them *in gremio* liberty to apply to the Court" (*per* Fry, J., *Fritz* v. *Hobson*, 1880, 14 Ch. D. 561); and therefore the omission of the reservation does not prevent parties from applying to the Court. This, however, only applies where the order is not one of a final character (*Penrice* v. *Williams*, 1883, 23 Ch. D. 353). As to its application to costs not expressly provided for, see *Kendall* v. *Marsters*, 1860, 2 De G., F. & G. 200; 45 E. R. 598; *Viney* v. *Chaplin*, 1859, 3 De G. & J. 282; 44 E. R. 1277; *Fritz* v. *Hobson*, *ubi supra*; *Gosnell* v. *Bishop*, 1888, 38 Ch. D. 385; Seton, 6th ed., 185.

[See Dan. *Ch. Pr.*, 7th ed., 628, 629; Seton on *Judgments and Orders*, 6th ed., 184, 185.]

Appointment, Power of.—See Power of Appointment.

Apportionment.—This cometh of the word *portio*, *quasi partio*, which signifieth a part of the whole; and apportion signifieth a division or partition of a rent, common, etc., or a making of it into parts (Co. Lit. 147*b*). The apportionment thus defined is of very ancient date, and is usually known as apportionment in respect of estate. The rent, etc., is apportioned, *i.e.* divided, in certain cases where it is unjust that the whole of it should be paid to a single person. Two causes may bring about this result: the act of the parties, and the act of law. If a lessee, by eviction under title paramount, or by forfeiture or surrender, lose possession of a part of the demised property, from every part of which the rent issues, he becomes liable only to pay a rent apportioned in value to the remainder; while an assignment by the reversioner of part of his reversion carries with it an apportioned part of the rent incident to the whole reversion, though the assignor and assignee cannot bind the lessee without his consent by an agreement to apportion the rent, unless the apportionment be made by a jury (see *Mayor of Swansea* v. *Thomas*, 1883, 10 Q. B. D. 48). But as a condition of re-entry in a lease could not, at common law, be apportioned by the act of a party, the assignee of the reversion of part of the demised premises could not re-enter for a condition which was broken. This, however, in the case

of re-entry for non-payment of rent which has been legally apportioned as just explained, has been altered by 22 & 23 Vict. c. 35, s. 3; whilst *as regards leases made after the year* 1881, the effect of the Conveyancing Act, 44 & 45 Vict. c. 41, s. 12, is to apportion all conditions in their nature apportionable which previously would have run with the unsevered reversion.

In the next place, where by act of law a lease of premises becomes inoperative as regards the whole subject-matter of the demise, the rent is apportioned in respect of the part as to which the demise is valid; and apportionment also arises where part of the land demised is actually destroyed by act of God (*q.v.*), as where it is permanently covered by an irruption of the sea. There are, moreover, many statutes which provide for apportionment when parts of lands subject to a demise or to a charge are required for public purposes, probably the commonest case being that under the Lands Clauses Act, 1845 (see 8 & 9 Vict. c. 18, ss. 116, 119).

Apportionment, however, has a more technical meaning when used as a legal term to denote the division of the beneficial interest in payments which, by common law, are indivisible. At common law, rents and all payments at fixed periods in the nature of income, except interest on money lent, were not apportionable in respect of time. The principle of the Apportionment Acts is to presume that such sums accrue *de die in diem*. Although earlier Acts are still unrepealed, they are practically superseded by the Act of 1870, 33 & 34 Vict. c. 35, an Act which applies to all instruments, whether coming into operation before or after the date of its passing. By this Act (s. 2) all rents, annuities, dividends (see these words defined in sec. 5), and other periodical payments in the nature of income are to be considered as accruing from day to day, and to be apportionable in respect of time accordingly. But it is provided (s. 3) that the apportioned part of such rent, etc., shall only be payable or recoverable, in the case of a continuing payment, when the entire portion of which it forms part becomes itself payable, and, in the case of a payment determined by re-entry, death, or otherwise, only when the next entire portion would have been payable if it had not so determined. And it is further provided (s. 4) that persons are to have the same remedies for recovering such apportioned parts as for the entire portions, though (in the case of rents) tenants are not to be resorted to for the apportioned parts specifically, their recovery being enforceable only against the heir or other person who, if the rent had not been apportionable, would have been entitled to recover it in its entirety. The Act, unlike the earlier Acts, extends to payments not made under any instrument in writing (s. 1), but not to any case where it may be expressly excluded by stipulation to that effect (s. 7); nor does it render apportionable any annual sums made payable in policies of assurance (s. 6).

The decisions on this Act have mainly fallen under two heads: apportionments of rent due under leases where an alteration of the right to receive, or the liability to pay, occurs at a time between the days fixed for payment; apportionments of income between the representatives of a limited owner and the remaindermen upon the determination of the limited interest at a time between the dates when such income became due.

The object of the Act was clearly only to divide accruing periodical

payments between the persons who, by reason of death, assignment, etc., become entitled to portions of the same; but it has received such an interpretation from the Courts as to materially affect contracts, in a way apparently which can hardly have been anticipated when the Act was passed. With regard, for instance, to decisions on the first class of cases, where a tenancy is determined in the middle of a quarter, no rent for such quarter, in the absence of any arrangement, was formerly payable at all (*Grimman* v. *Legge*, 1828, 8 Barn. & Cress. 234; 32 R. R. 398). Now, however, an amount proportioned to the time of actual occupation has been held to be recoverable from the tenant (*Swansea Bank* v. *Thomas*, 1869, 4 Ex. D. 94; *Hartcup* v. *Bell*, 1883, C. & E. 19), unless (as it seems) the determination be due to a wrongful act or default on the part of the landlord (*Clapham* v. *Draper*, 1885, C. & E. 484). Similarly, where a lease is held by a company which goes into liquidation in the middle of a quarter, though the Act does not entitle the landlord to petition as creditor for an apportioned rent—inasmuch as it provides, as already seen, that such apportioned rent becomes payable when, and only when, the whole rent becomes due (*Re United Club Co.*, 1889, 60 L. T. 665)—it empowers him, when the quarter has expired, to prove for his rent apportioned down to the commencement of the winding-up (*In re South Kensington Stores*, 1881, 17 Ch. D. 161); whilst a similar result follows, by force of a special statutory provision, in the case of the bankruptcy of an ordinary tenant (46 & 47 Vict. c. 52, sched. 2, r. 19). And the application of the Act has been still further widened by the most modern decisions upon it; for it has been held that it apportions liabilities as well as rights, so that, as the law stands at present, it seems that if a tenant assign his interest in the middle of a quarter, the assignee will become liable when the quarter day arrives only for rent apportioned from the time of the assignment to him (*In re Wilson*, 1893, 62 L. J. Q. B. 628; *In re Howell*, [1895] 1 Q. B. 844). So far as the English *decisions* have gone, this result, it is true, only holds good where the assignment in question takes place by reason of bankruptcy; but the principle they lay down would seem to be of general application, and a majority of the Court of Appeal in Ireland (where, it may be pointed out, special statute law has to a certain extent to be taken into account) have followed that view (*Glass* v. *Patterson*, [1902] 2 I. R. 660). Rent, however, which by the terms of a tenancy is payable in advance, is not within the Apportionment Act, for that enactment does not extend to sums properly paid before the happening of the incident which is said to necessitate the apportionment (*Ellis* v. *Rowbotham*, [1900] 1 Q. B. 740). Nor does the Act make rent capable of attachment (where it has not become payable) under a garnishee order as a debt owing or accruing due (*Barnett* v. *Eastman*, 1898, 67 L. J. Q. B. 517). A further illustration of the difficulty of the subject may be seen in a modern case, where, after demising some property at a certain rent, which the tenant allowed to fall into arrear, the owner, by his will, directed that all rent due at the time of his own death should be remitted, and the Court of Appeal differed in opinion as to the law which should be applied; though a majority decided that neither by the intention of the testator, nor on the true construction of the Apportionment Act, was the tenant entitled to be relieved of liability for rent for the quarter during which the testator died, apportioned to the time of such death (*In re Lucas*, 1885, 55 L. J. Ch. 101).

There are numerous decisions upon the second class of cases, namely, the apportionment under the Act of sums paid by way of income, which have been accruing during the continuance of the limited estate but become payable after its determination, between the representatives of the limited owner and the remainderman. The result of the authorities may be stated to be: first, that all dividends (see the definition in sec. 5) paid by public companies, whether paid at fixed periods or not, are apportionable, unless it appear that the payment is in fact a payment of capital; and in deciding on the real character of the payment, the Court has regard to all the circumstances under which it is made, and more especially the powers and intention of the company making the distribution (*Bouch* v. *Sproule*, 1887, 12 App. Cas. 385; *In re Alsbury*, 1890, 45 Ch. D. 237; *In re Armitage*, [1893] 3 Ch. 337; *In re Malam*, [1894] 3 Ch. 578); next, if the payment be not a dividend as defined in sec. 5, it is not a "periodical payment" within sec. 2, unless paid at fixed periods in pursuance of a binding obligation, and not at periods that are in the discretion of the payer (*Jones* v. *Ogle*, 1873, L. R. 8 Ch. 192; *In re Cox's Trusts*, 1878, 9 Ch. D. 159; *In re Griffith*, 1879, 12 Ch. D. 655). Thus the profits of a private business, which the managers can divide at any time as they in their discretion choose, are not apportionable (*Jones* v. *Ogle*, *supra*).

A point of importance as to the effect of apportionment between persons entitled to income and those entitled to capital, where the stocks representing the capital are sold with an accrued or accruing dividend, was decided in *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241. Before the Act of 1870, the practice of the Courts of Equity was to disregard claims by persons entitled to income to have an apportionment made of capital so realised in their favour, except under special circumstances (*Freman* v. *Whitbread*, 1866, L. R. 1 Eq. 266); and Stirling, J., in *Bulkeley* v. *Stephens*, *supra*, decided that the Apportionment Act has not altered this practice. Special circumstances within the meaning of this rule would appear to exist where an apportionment is necessary to compensate persons claiming it for a right lost through no fault of theirs, either by delay or alteration in the execution of the trusts under which the realisation of capital was effected.

Another instance of equitable apportionment apart from statute is that which arises in the execution of trusts where, owing to the fund being reversionary or its payment deferred, it becomes just to apportion it as between persons entitled to income and those entitled to capital. The general rule applied in such cases will be found in *In re Earl of Chesterfield's Trusts*, 1883, 24 Ch. D. 643, as modified by *In re Goodenough*, [1895] 2 Ch. 537. The latter case has been followed by the Court of Appeal in *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

It may be added that the word "apportionment" has often been used both by the legislature and by judges, in a wide sense, as synonymous either with a division of benefits amongst different persons entitled to receive them (as in the case, for instance, of money awarded for salvage, *q.v.*), or with an allocation of burdens amongst different persons liable to bear them (as in the case, for instance, of paving expenses under the Public Health Act). In this application, however, it requires no special notice in an explanation of the uses of the word in its strictly legal sense.

[*Authorities.*—Lewin on *The Law of Apportionment;* Gover's *Law of Capital and Income.*]

Appraisement.—(See, for general law, VALUATION.)—This term in Admiralty law means the valuation of a ship or her cargo by order of the Admiralty Division of the High Court. A ship's value may be ascertained either by appraisement or agreement; when there is any dispute as to the value, appraisement is the proper course (*The Charlotte Wylie*, 1846, 5 N. C. 6). It is generally only resorted to in salvage actions and proceedings by default, where the ship has been arrested, but may be in any case where there is a dispute as to the value of the property which its owner desires to release on giving bail (Pritchard, *Digest*, 1671); or in actions of restraint, where it may be required in order to determine the value of the shares of the minority of the owners (*The Robert Dickinson*, 1884, 10 P. D. 15; *The Cawdor*, [1900] P. 47). The method of obtaining appraisement is by order from the Court, which may make the order though the ship is foreign (*The Hercules*, 1885, 11 P. D. 10); after which a commission of appraisement will be issued from the Admiralty Registry. Where it is necessary to have the cargo unladen in order to have the property appraised, a commission of unlivery should be also applied for (Williams and Bruce, 3rd ed., 314). The procedure under the commission consists in the Admiralty marshal or his substitute making an inventory of the property, getting a qualified person to appraise it on oath, and in writing, making a written certificate of what has been done, and returning these three documents with the commission into the registry (*ibid.* 309). The effect of an appraisement made by the order of the Court is to bind the parties interested, and the owner cannot afterwards have its value determined by sale of the property (*The R. M. Mills*, 1860, 1 Mar. L. C. 5). An appraisement may be set aside on motion by a party aggrieved by it, it not properly made, and a second appraisement ordered (*The Oscar*, 1829, 2 Hag. Adm. 258). If no objection be made to it, it is conclusive of the value of the property (*Cargo ex Venus*, 1866, L. R. 1 Ad. & Ec. 50, where cargo arrested for salvage and appraised at £1900 was afterwards sold before hearing the action for £1000 net, but the award was made on the appraised value (see *The Georg*, [1894] P. 330, 336*n.*)). Where a ship has been appraised, she cannot, in the first instance, be sold by the marshal for less than her appraised value, and such sale must be by public auction, unless all parties interested consent to a private sale for not less than the appraised value (*The Planet*, 1883, 5 Asp. 144). The costs of an appraisement, if it be necessary, are costs in the action; but if it has been insisted upon by a party without just cause, he bears the costs; and in salvage cases, unless a great disparity is shown between the value proved by the owner and the actual value of the *res*, the Court is inclined to discountenance any dispute of the valuation by fixing the costs of appraisement on that person (Williams and Bruce, 3rd ed., 315, citing recent cases). Appraisement is also generally required for a sale of property by order of the Court (*ibid.* 316).

For the costs of appraisement and unlivery, see Williams and Bruce, 3rd ed., 315.

[For Forms, see next page.]

FORMS.

I.—*Præcipe of Commission of Appraisement and Sale* (*O.* 51, *r.* 14).

19 . [*Here put the letter and number.*]

In the High Court of Justice,
Probate, Divorce, and Admiralty Division,
Between A.B., Plaintiff,
and
the owners of the

I, A. B., solicitor for the [*state whether plaintiff or defendant*], pray a commission for the appraisement and sale of the [*state name and nature of property*] which was decreed by the Court on the day of , 19 .

Dated the day of , 19 .

[*To be signed by the solicitor, or by his clerk for him.*]

II.—*Commission of Appraisement and Sale* (*O.* 51, *r.* 14).

[*Heading as in Form* 1.]

EDWARD THE SEVENTH, by the grace of God, &c. [*as in Form No.* 1]. To the Marshal of the Probate, Divorce, and Admiralty Division of our said High Court, and to all and singular his substitutes, greeting: Whereas in an action of commenced in our said High Court on behalf of against [and against intervening], the Judge has ordered the said to be appraised and sold. We therefore hereby authorise and command you to reduce into writing an inventory of the said , and having chosen one or more experienced person or persons, to swear him or them to appraise the same according to the true value thereof, and upon a certificate of such value having been reduced into writing, to cause the said to be sold by public auction for the highest price, not under the appraised value thereof, that can be obtained for the same. And we further command you, immediately upon the sale being completed, to pay the proceeds arising therefrom into the Registry of the said Division, and to file the certificate of appraisement signed by you and the appraiser or appraisers, and an account of the sale signed by you, together with this commission.

Witness, &c. (Seal.)

Commission of Appraisement and Sale.

Taken out by .

III.—*Usual Order for Appraisement and Sale, reserving all Questions of Priority.*

Admiralty Division.

[*Name of ship.*] [*Date.*]

The Judge, having heard counsel for the respective plaintiffs in the

several actions instituted against the [*name of ship*] and for the mortgagees of the said vessel, decreed her to be appraised and sold, reserving all questions as to priority of payment out of the proceeds of such sale when brought into Court.

IV.—*Appraisement.*

The
an inventory of the or vessel.

[*Here follow the details of the inventory.*]

I, Admiralty marshal, do certify that by virtue of a commission of appraisement and sale, dated the day of 19 , and issued in this action, I have chosen of , an experienced person, and have sworn him to appraise the according to the true value thereof. And I, the said , whose name is hereunto subscribed, do certify that, by virtue of my said oath, I have faithfully and justly appraised the said at the sum of .

In witness whereof we have hereunto respectively set our hands this day of 19 .

[*Signature of marshal.*]
[*Signature of appraiser.*]

Apprentice.—An apprentice is a person (male or female, adult or infant) who voluntarily binds himself for a definite term to serve and learn from a master, who covenants to teach him his trade or calling. No particular description of instrument or form of words is requisite to create a contract of apprenticeship between the contracting parties, but a "writing" is necessary if the binding is for a longer term than a year. Any agreement between a master and apprentice, whereby the latter agrees to *serve* for any stated term, and the former agrees to *teach*, would amount to a contract of apprenticeship, the consideration being the covenant on the part of the master to teach. Any person capable of making a contract may take an apprentice. An infant may also take an apprentice, but the contract is voidable. Any person of legal capacity can bind himself as an apprentice. Infants, even without their parents' consent, may voluntarily bind themselves upon the general principle, that if an agreement be for the benefit of an infant it shall bind him. [See *Green* v. *Thompson*, [1899] 2 Q. B. 1, and cases there cited.] But an infant can avoid the indenture the moment he comes of age, as every indenture of an infant is voidable at his election (*Ex parte Davies*, 1784, 5 T. R. 715), but if he wishes to avoid the contract he must do so within a reasonable time after he comes of age; and he can also avoid the indenture whilst under age, if it is clearly for his advantage to do so (*R.* v. *Gt. Wigston*, 1824, 3 Barn. & Cress. 484). At common law no action can be brought against an infant apprentice on his covenant to serve (*Gylbert* v. *Fletcher*, 1627, Cro. Car. 179). If an apprentice is placed with a master to learn his business, and that business consists of two or more trades, he will be entitled to receive

instruction in all those trades; and if the master gives up any one of them, the apprentice may cease from serving the master, and the latter will be liable on his covenant to teach (*Ellen* v. *Topp*, 1851, 6 Ex. Rep. 424; 20 L. J. Ex. 241). An apprentice is not bound to work for his master on Sundays (*Phillips* v. *Innes*, 1837, 4 Cl. & Fin. 234; 7 E. R. 90; 42 R. R. 19), but he is on bank holidays. [A deed of apprenticeship which bound the apprentice for five years, excepting the usual holidays and days when the business of the master should be at a standstill through accident beyond the control of the master, is not so disadvantageous to an apprentice as to be unenforceable against him (*Green* v. *Thompson*, [1899] 2 Q. B. 1).] An apprentice cannot be compelled to serve the executors, etc., of his master, unless he so bound himself by the indentures or agreement, but if he is bound to a master, his "executors and administrators," he will be bound to serve them after the master's death (*Cooper* v. *Simmons*, 1862, 7 H. & N. 707; 31 L. J. M. C. 138); and where an apprentice binds himself to a firm and their successors he will be bound to serve the latter. Apprentices cannot be enrolled in the volunteer forces without the consent of their masters (*Volunteer Regulations*, 1895, par. 163), and if an apprentice enlist, the master may reclaim him while under age, provided he takes the necessary steps laid down by the Army Act, 1881, s. 96 (44 & 45 Vict. c. 58).

The stamp duty on indentures of apprenticeship is 2s. 6d., whether a premium is paid or not (53 Vict. c. 8, s. 19), but the indentures of parish apprentices and apprentices to the sea services are exempt from duty (33 & 34 Vict. c. 97; and 57 & 58 Vict. c. 60, s. 108). Instruments of apprenticeship must be stamped, and the full consideration truly set out in them, and, if it be not fully set forth, the instrument will be null and void (33 & 34 Vict. c. 97, s. 40). The instrument must be stamped before execution. A master need not execute the indentures of apprenticeship, but adult apprentices must execute them, and so must infants (*R.* v. *Arnesby*, 1820, 3 Barn. & Ald. 584), but they may have their names affixed to the indenture by an agent. Corporations and companies may execute indentures of apprenticeship by affixing their seal to them.

The age of persons binding themselves apprentices is immaterial, so that they be not under seven years of age (see *R.* v. *Saltern*, 1784, 1 Bott. P. L. Cas. 717). But "parish" apprentices, apprentices to chimney-sweeps, and to the sea service, cannot be bound under the ages of nine, twelve, and sixteen respectively (56 Geo. III. c. 139, s. 7; 3 & 4 Vict. c. 85, s. 3; 57 & 58 Vict. c. 60, s. 106); and where a statute prohibits the taking of an apprentice under a certain age, and a child under that age is notwithstanding taken as such, the binding will be void (*R.* v. *Hipswell*, 1828, 8 Barn. & Cress. 466; 1 Man. & R. 474). Parents cannot bind their infant sons, or daughters, apprentices without their assent. A master must teach his apprentice all the branches of his trade, but he may depute the teaching to properly qualified workmen. The master is entitled to the custody of the indentures until the end of the term, when they should be cancelled and given up to the apprentice. A master has no common-law right to dismiss his apprentice for ordinary misconduct (*Winstone* v. *Linn*, 1823, 1 B. & C. 460; 25 R. R. 455; *Phillips* v. *Clift*, 1859, 28 L. J. N. S. 153; 4 H. & N. 168). He can only do so where the contract in express

terms gives him the power to dismiss him (*Westwick* v. *Theodor*, 1875, L. R. 10 Q. B. 224; 44 L. J. Q. B. 110), but a master may dismiss an apprentice who is an "habitual thief" (*Learoyd v. Brook*, [1891] 1 Q. B. 431). A master cannot assign the indentures without the apprentice's consent, even if he assign his business.

A master must pay to the apprentice the wages he has covenanted that he shall receive, and cannot deduct anything for the days the apprentice may be absent from his work owing to illness, accident, etc., except it is so provided in the indenture. Neither can he deduct anything out of the wages for loss of time, either wilful or accidental, or where, owing to some statutory enactment, such as the Factory Acts, he is prevented from working, nor for breakages or such like faults. A master may have any number of apprentices. If an apprentice die during the term of the apprenticeship, the parent will not be entitled to a return of any part of the premium paid, except there is a special agreement to that effect. A master may administer corporal punishment to his apprentice for negligence or other misbehaviour, provided it be done with moderation; but he must exercise this authority himself; he cannot delegate it to another. If a master uses excessive violence or cruelty towards his apprentice, he will be liable to fine or imprisonment (24 & 25 Vict. c. 100, s. 26). A contract of apprenticeship may be dissolved or determined—(1) by effluxion of time, or by the apprentice coming of age; (2) by bankruptcy of the master (but this does not dissolve the contract of apprenticeship, unless so stipulated in the instrument, and on the bankruptcy of the master the apprentice can avail himself of the provisions of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 41, subss. 1 and 2; (3) by death; (4) by consent; (5) by misconduct (in certain cases). The master, during the term of the apprenticeship, has an absolute and exclusive right to the services of his apprentice, and is entitled to all his earnings.

Summary jurisdiction over apprentices is limited, by the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, to those upon whose binding either no premium is paid, or the premium paid does not exceed £25, to apprentices bound under the provisions of the Acts relating to the relief of the poor, and to apprentices to the sea service (43 & 44 Vict. c. 16, s. 11). A Court of summary jurisdiction, under the powers conferred by this Act, is enabled to entertain all kinds of "disputes" between masters and apprentices, and to make orders for the payment of wages; to set off and adjust "claims"; to order payment of compensation for absenting; to rescind the contract where it is disadvantageous, or where there is incapacity to work, owing to illness or to the nature of the employment; to accept security for the due performance of the contract in lieu of damages; to order the apprentice to perform his duties under the contract; and, where it rescinds the contract, to order the whole or any part of the premium to be returned. It may order an apprentice to be imprisoned for a period not exceeding fourteen days, without hard labour.

Apprentices bound according to the "custom of London" are those who are bound according to the ancient customs of the "City" of London. Any unmarried infant above the age of fourteen and under the age of twenty-one can be so bound to a freeman or freewoman of London, and they must be bound by indenture, and for a period of not less than four years. They are subject to the jurisdiction of

the "Chamberlain" of London, who can commit unruly apprentices to Bridewell Prison.

Miscellaneous Points in Criminal Law.—1. Apprentices under sixteen fall within the scope of the Prevention of Cruelty to Children Act, 1904, 4 Ed. VII. c. 15. [See CRUELTY.]

2. A master is bound at common law to provide his apprentice with proper food, and with proper medical advice during illness, and if his failure to do so leads to the death of the apprentice, is indictable for manslaughter (*R.* v. *Smith*, 1837, 8 Car. & P. 531; and see *R.* v. *Self*, 1776, 1 Leach, 137; *R.* v. *Ridley*, 1811, 2 Camp. 650). Under the Offences Against the Person Act, 1861, 24 & 25 Vict. c. 100, s. 26, it is a misdemeanor for any person, who is legally liable to provide for an apprentice necessary food, clothing or lodging, wilfully to refuse or neglect to provide it, or wilfully and maliciously to do or cause to be done any bodily harm to such apprentice, so that the life of the apprentice is endangered, or his health is, or is likely to be, permanently injured. The offence is punishable by penal servitude from three to five years, or imprisonment with or without hard labour, for not more than two years (24 & 25 Vict. c. 100, s. 26; 54 & 55 Vict. c. 69, s. 1).

3. The Conspiracy and Protection of Property Act, 1878, 38 & 39 Vict. c. 86, s. 6, gives a summary remedy for neglect by a master to provide necessary food, clothing, *medical aid*, or lodging, whereby the health of the apprentice is, or is likely to be, *seriously* or permanently injured.

4. In the case of parish apprentices, the guardians of the poor can recover summarily from the master the expense of maintenance and clothing, when the master has neglected to provide them (32 Geo. III. c. 57, s. 6), or prosecute him for breach of the conditions of the indentures (7 & 8 Vict. c. 101, s. 10); and by sec. 73 of the Offences Against the Person Act, 1861, 24 & 25 Vict. c. 100, the guardians may prosecute for offences against parish apprentices, at the cost of the common fund of the union; see also Poor Law Act, 1844, 7 & 8 Vict. c. 101, s. 59.

[Austin, *Law Relating to Apprentices*, 1890; Bac. *Abr.*, tit. "Master and Servant;" Com. *Dig.*, tit. "Justices of the Peace."]

PRECEDENTS.

I. *ARTICLES of* APPRENTICESHIP *to a* TRADER.

(Short Form.)

Parties.

THIS INDENTURE, made the day of , 19 , BETWEEN [*apprentice*], of the first part; [*father of apprentice*], of &c., of the second part; and [*master*], of &c., of the third part:

Apprentice binds himself.

WITNESSETH that the said [*apprentice*] of his own free will, and with the consent of the said [*father*], hereby binds himself as apprentice to the said [*master*] during the term of years, to

Covenants by father.

learn the trade and business aforesaid; AND the said [*father*] hereby covenants with the said [*master*] that, during the said term, the said [*apprentice*] shall honestly, faithfully and diligently serve and obey the said [*master*], and shall not do or commit, or suffer to be done or committed, any waste, damage or injury of or to the property of the said [*master*], and shall not unlawfully absent himself from the service of the said [*master*]; and further, that he, the said [*father*], will, at his own expense, provide the said apprentice with good and sufficient clothes, washing, medicines and medical attendance, and other necessaries, except as is hereinafter otherwise stipulated, during the said term: IN CONSIDERATION whereof, and also in consideration of the premium or sum of £ now paid to the said [*master*] by the said [*father*] (the receipt whereof is hereby acknowledged), the said [*master*] hereby covenants with the said [*father*], and also with the said [*apprentice*], that he, the said [*master*], will during the said term take and receive as his apprentice, and to the best of his knowledge and ability teach and instruct in the trade and business of a , and all things incident thereto, the said [*apprentice*], in such manner as he, the said [*master*], now does or shall hereafter use or practise the same; and will also during the said term provide the said [*apprentice*] with good and sufficient board and lodging; and will also, from and after the expiration of the first year of the said term, pay to the said [*apprentice*] wages at the rates and in manner following—that is to say, during the second year of the said term the sum of per week [*or* month], and during the third year of the said term the sum of per week [*or* month], and during the remainder of the said term the sum of per week [*or* month], and will, on the completion of the said term, endorse on these presents a certificate that the said [*apprentice*] has duly served his apprenticeship in due conformity to these presents, and deliver the same so indorsed to the said apprentice.

Covenants by master to instruct.

To provide board, &c.

IN WITNESS, &c.

II. *ARTICLES of* APPRENTICESHIP *to a* MERCHANT, *with* SPECIAL PROVISIONS.

THIS INDENTURE, made the day of , 19 ,

Parties.

BETWEEN [*apprentice*], of &c., of the first part; [*father*], of &c., the father of the said [*apprentice*], of the second part; and [*master*], of &c., carrying on the trade or business of at of the third part: WITNESSETH, and it is hereby agreed and declared, and the said [*father*], so far as relates to the acts and stipulations on the part of himself and of the said [*apprentice*] to be performed and observed, covenants with the said [*master*], and the said [*master*], so far as relates to the acts and stipulations on his part to be performed and observed, covenants with the said [*father*], and also separately with the said [*apprentice*], as follows, that is to say:—

Testatum.

Apprentice binds himself.

1. The said [*apprentice*], of his own free will and accord, and with the consent of the said [*father*], hereby places and binds himself as apprentice with and to the said [*master*], from the date of these presents for the term of years, to learn the trade or business of .

Covenants by father that apprentice will serve,

2. The said [*apprentice*] will, during the said term, well and truly serve the said [*master*], as apprentice in the trade or business aforesaid, at such place or places, either within the United Kingdom or elsewhere, as the said [*master*] shall direct and appoint, and will diligently attend to the business and concerns of the said [*master*].

and not absent himself;

3. The said [*apprentice*] will not, without permission, absent himself from the service of the said [*master*], nor do or commit any damage or waste to the said [*master*] or his concerns, nor knowingly suffer the same to be done by others, if within his power to prevent it, nor without forthwith giving notice thereof to the said [*master*].

to assist in conducting master's business;

4. The said [*apprentice*] will, during the said term, receive and take into his care and custody all such goods and merchandise and other articles of every description as shall be consigned or sent to him by or for the use or on account of the said [*master*], and will sell and dispose of the same to the best possible profit, for the benefit of the said [*master*]. And also will, at all times during the said term, follow and perform the advice, direction and orders of the said [*master*], which shall by letters or otherwise be sent, given or made known to him, the said [*apprentice*], concerning such goods, merchandise and articles as aforesaid.

to keep books of accounts;

5. The said [*apprentice*] will, at the cost of the said [*master*], provide and keep in good order books of account concerning such his employment as aforesaid, according to the custom of merchants in such cases: And will deal justly, truly and faithfully with the said [*master*], in all and every his accounts, reckonings, bargains and dealings relating to and concerning his said employment, and will, from time to time, as occasion shall arise, send to the said [*master*] true accounts of all the business and dealings of him the said [*apprentice*], and letters of advice of all such measures and occurrences wherewith it shall be proper that the said [*master*] shall be acquainted, and will return to aforesaid, if employed away therefrom, whenever thereunto required by the said [*master*], by letter or otherwise, with all his accounts and reckonings duly made up and in proper order.

to deliver accounts.

6. The said [*apprentice*] will, from time to time, when requested so to do, produce and show to the said [*master*] all his books of account concerning all such dealings as aforesaid, and make and give to the said [*master*] a just and perfect account and reckoning of and concerning all and every such goods, merchandise and other articles and moneys which shall come into his hands of or on behalf of the said [*master*]. And, moreover, that he will, within days after every such account as aforesaid shall have been sent to the said [*master*], deliver and pay to the said [*master*] all and every

such goods, merchandise and other articles and moneys as by such account shall be shown to be due from the said [*apprentice*] to the said [*master*].

Covenant by father to provide necessaries.

7. The said [*father*] will at his own cost provide the said [*apprentice*] during the said term with sufficient and suitable clothes and apparel, and also with medicine and medical attendance and other necessaries, except as is hereinafter mentioned.

Covenants by master to take apprentice;

8. In consideration of the service of the said [*apprentice*] and of the covenants and stipulations on his part and on the part of the said [*father*] to be observed and performed, and also in consideration of the premium or sum of £ , paid &c., the said [*master*] agrees to take and accept the said [*apprentice*] as his apprentice during the said term, and to employ him not only at aforesaid but also at other places in the United Kingdom and abroad where the said [*master*] now has or shall hereafter during the said term have dealings.

to employ and instruct apprentice;

9. The said [*master*] will employ and instruct the said [*apprentice*], or cause him to be employed or instructed, in the said trade or business of , and in all matters incident thereto, to the best of his skill, knowledge and ability.

to provide board and lodging, or allowance in lieu thereof;

10. The said [*master*] will either provide the said [*apprentice*] with good and sufficient board and lodging in the house of him, the said [*master*], in a similar manner with his own family, and so that the said [*apprentice*] shall at all times take his meals at the table with, and at the same time as, the master and his family; or will, if and whenever the said [*apprentice*] shall be absent from aforesaid on the business of the said [*master*], and at any other times if the said [*master*] shall so think proper, pay or allow to the said [*apprentice*] during the said term or any part thereof the sum of £ per month in lieu and full satisfaction of the board and lodging of the said [*apprentice*].

to pay expenses of journeys, &c.;

11. The said [*master*] will also at all times during the said term pay all the expenses of and incident to any journeys which the said [*apprentice*] shall make to any place or places in the United Kingdom or elsewhere, on the business and by the direction or with the sanction of the said [*master*].

to pay wages.

12. From and after the expiration of the second year of the said term the said [*master*] shall pay to the said [*apprentice*] wages at the rates and in manner following, that is to say, during the third year of the said term, &c. [*as agreed*].

Apprentice may terminate contract by notice.

13. The said [*apprentice*] shall, if he shall think proper, and shall of his intention give weeks' notice in writing of such his intention, be at liberty freely to leave the service of the said [*master*] at the expiration of the th year of the said term, and to use and employ the remaining year of his apprenticeship to his own benefit and advantage, where and as he shall think fit, without let or hindrance from or by the said [*master*], but so nevertheless that during the said remaining year the said [*apprentice*] shall not in that case be entitled to any board or lodging, or allowance or payment in

lieu or satisfaction thereof respectively, or to any wages from or at the cost of the said [*master*], and that the said [*master*] shall not be entitled to any gains or earnings made by the said [*apprentice*] during that year.

IN WITNESS, &c.

III. *ARTICLES of* APPRENTICESHIP *to an* ARCHITECT *and* SURVEYOR.

THIS INDENTURE, made the day of , 19 ,

Parties. BETWEEN [*apprentice*], of &c., of the first part, [*guardian*], of &c., of the second part, and [*master*], of &c., of the third part: WHEREAS

Recitals: of will of apprentice's father; A. B., late of &c., the father of the said [*apprentice*], died on the day of 19 , having by his will, dated the day of , and which has since been duly proved, appointed the said [*guardian*] to be the guardian of his children during their

of age of apprentice; respective minorities: AND WHEREAS the said [*apprentice*] attained the age of years on the day of last: AND

of agreement by master to take apprentice. WHEREAS the said [*master*] has agreed to take the said [*apprentice*] as his apprentice or pupil on the terms and conditions hereinafter mentioned, for the purpose of his being taught the arts, businesses or employments of an architect and surveyor: NOW THIS INDENTURE WITNESSETH, and it is hereby agreed and declared, and the said [*guardian*], so far as relates, &c. [*mutual covenants as in the last precedent*, ante, p. 435], as follows, that is to say:—

Testatum.

Apprentice binds himself. 1. The said [*apprentice*], of his own free will and accord, and with the consent of the said [*guardian*], hereby places and binds himself as apprentice or pupil with and to the said [*master*] during the term of years, to be computed from the day of next, to learn the arts, businesses or employments of an architect and surveyor.

Covenant by guardian that apprentice will serve; 2. The said [*apprentice*] will, during the said term, well and truly serve the said [*master*] in the said arts or businesses of an architect and surveyor, and will diligently attend to his business and affairs at the offices of the said [*master*], or elsewhere, in the United Kingdom, as he the said [*master*] shall direct, from the hour of o'clock in the morning until the hour of in the evening, save and except an interval of one hour and a half, which is to be allowed to the said [*apprentice*] for the purpose of dinner and relaxation.

and not waste master's property, &c. 3. The said [*apprentice*] will not do or commit any damage, default or waste to his said master, or his business, or affairs, nor knowingly suffer the same to be done, if within his power to prevent it, nor without immediately giving notice to the said [*master*], but will in all respects behave and demean himself as a true and faithful apprentice.

Covenants by master: to instruct; 4. In consideration of the premises, and also in consideration of the premium, &c., the said [*master*] will, from and after the said day of next, during the said term take and receive

the said [*apprentice*] as his apprentice and pupil, and will, according to the best of his skill, knowledge and ability, teach and instruct, or cause to be taught or instructed, the said [*apprentice*] in the several arts, businesses and employments of an architect and of a surveyor, and in all matters and things incident thereto; And will permit the said [*apprentice*] to have free and full access to and information concerning all estimates, calculations, drawings, plans, specifications and other matters and things which shall be made, or caused to be made, by him the said [*master*], or which shall come into his possession or under his control or superintendence, with reference to works or business in which he shall be engaged, employed or consulted (unless he shall see any good and special reason to the contrary in any particular instance or instances); And generally will give and afford to the said [*apprentice*] all reasonable facilities and opportunities for learning the principles and practice of the said arts, businesses or employments, in such manner as he the said [*master*] now does, or shall at any time hereafter during the said term use or practise the same; And will, every day during the said term, between the hours of in the morning and in the evening, provide the said [*apprentice*] with proper and convenient accommodation at the office of him the said [*master*], and also will supply the said [*apprentice*], free of charge, with good and sufficient paper, materials, instruments and appliances for the purpose of enabling him to learn and practise the arts, businesses or employments aforesaid.

to pay travelling expenses;

5. In case the said [*master*] shall at any time during the said term employ the said [*apprentice*] away from the office aforesaid in or about any matter or thing connected with any works or business for the time being carried on by or under the superintendence of the said [*master*], he the said [*master*] will bear and pay all expenses of and incident to any journeys undertaken, and all other expenses properly incurred by the said [*apprentice*], with the sanction of the said [*master*], by reason of such employment.

that in case of apprentice's death part of premium shall be returned;

6. If the said [*apprentice*] shall die, or be disabled by illness or accident from following the art, business, or employment of an architect and surveyor (such disability to be certified by two competent medical practitioners), at any time within calendar months from the date of these presents, he the said [*master*] will return to the said [*apprentice*], or his executors, administrators or assigns, the sum of £ , part of the said premium or sum of £ so paid by or on behalf of the said [*apprentice*] as aforesaid.

that in case of master's death apprentice shall be assigned to a new master.

7. In case the said [*master*] shall die before the expiration of the said term, then and in such case the executors or administrators of the said [*master*] shall, within weeks after his death, at their own cost, assign the said [*apprentice*] to some competent person, being an architect and surveyor, for the residue then unexpired of the said term, upon terms the same or equally advantageous to the said [*apprentice*] as are contained in these presents; in default whereof, the executors or administrators of the said [*master*] shall pay to the said [*apprentice*] the sum of £

for every year of the said term which shall be unexpired at the time of the death of the said [*master*].

IN WITNESS, &c.

IV. *ARTICLES of* APPRENTICESHIP *to a* FIRM *of* ENGINEERS.

THIS INDENTURE, made the day of , 19 , BETWEEN [*apprentice*], of &c., of the first part, [*father*], of &c., the father of the said [*apprentice*], of the second part, and [*engineers*], of &c., mechanical engineers, co-partners, of the third part, WITNESSETH as follows, that is to say :—

Apprentice binds himself.

1. The said [*apprentice*] (hereinafter referred to as the apprentice), with the approbation of his said father, places and binds himself as apprentice to the said [*engineers*], and to the successors and successor of them, and to such other person or persons as may from time to time carry on the business now carried on by them or any of them (all of whom are hereinafter referred to as the firm), to learn the art, trade or business of an engineer, and with the firm, after the manner of an apprentice, to serve from the day of next, for the term of years, at aforesaid, or at any other place in England or Wales at which the firm may for the time being carry on their said business.

Covenant by father for service of apprentice.

2. The said [*father*] hereby covenants that the apprentice will during the said term well and truly serve, &c. [*ante*, p. 438].

Covenant by father to provide board, lodging and necessaries.

3. The said [*father*] hereby further covenants with the firm that he will at all times during the said term provide the apprentice with sufficient and suitable board, lodging, washing, and clothes, medicine and medical attendance, pocket money and all other necessaries, at aforesaid : PROVIDED ALWAYS, that if the firm shall at any time during the said term employ the apprentice at any place in England or Wales, more than miles from , then and in such and so long as the apprentice shall be so employed, the firm shall find and provide the apprentice with sufficient and suitable board and lodging, and the said [*father*] shall pay to the firm the sum of per week in respect thereof.

Proviso in case of employment away from home.

Masters accept apprentice.

4. In consideration of the service of the apprentice and the covenants on the part of the apprentice and the said [*father*] hereinbefore contained, and also in consideration of the sum of £ paid by the said [*father*] to the firm, the receipt whereof is hereby acknowledged, the firm hereby agree to take the apprentice into their said business of mechanical engineers for and during the term aforesaid.

Covenants by masters to teach, &c.

5. The said [*engineers*] covenant with the apprentice, and also separately with the said [*father*], that the firm will during the said term teach and instruct the apprentice, or cause him to be taught and instructed in all branches of the said business, and in all things incident thereto, and give him access to estimates, calculations, specifications, drawings and plans of engines, machines, works or

things undertaken, or proposed to be undertaken, by the firm, and also to their workshops and business premises, and to give him every facility for acquiring a full, practical and theoretical knowledge of the business of a mechanical engineer.

Hours of business.

6. The apprentice shall not be required to attend to the business or concerns of the firm any more than hours in any one and the same day, namely, from the hour of in the morning until the hour of in the evening, except two hours to be allowed for dinner and relaxation, unless it shall be unavoidably necessary by reason of extraordinary pressure of business that he should be longer employed.

In case of dissolution of the firm a new master to be provided.

7. It is hereby agreed and declared that if at any time during the said term the firm shall be dissolved, or if they shall cease to carry on, either at or some other place in England or Wales, the business aforesaid in all its branches as now carried on by them, then and in any such case the firm, or some or one of the then members thereof, will within the space of one calendar month thereafter find and provide some other firm or competent person carrying on the business aforesaid in all its branches as now carried on by the firm, and will turn over and assign the apprentice to such firm or person upon and subject to the same or the like conditions and stipulations in all respects as are hereinbefore provided in relation to the present apprenticeship; Or in default thereof, the firm, or some or one of the then members thereof, will immediately, on the expiration of the said one calendar month, refund to the apprentice, or to the said [*father*], the said premium or sum of £ , or such part thereof as shall bear a just proportion to the time which shall then be unexpired of the said term of apprenticeship.

IN WITNESS, &c.

V. *ARTICLES of* APPRENTICESHIP *to a* SURGEON, *the* PREMIUM *to be paid by* INSTALMENTS.

THIS INDENTURE, made the day of , 19 , BETWEEN [*apprentice*], of &c., of the one part, and [*master*], practising as a surgeon, apothecary and accoucheur at , WITNESSETH, and each of them, the said [*apprentice*] and the said [*master*], so far as relates to the acts and stipulations herein contained, and on his part to be performed and observed, covenants with the other of them as follows,[1] that is to say :—

Apprentice binds himself.

1. The said [*apprentice*] places and binds himself as an apprentice to the said [*master*] for the term of years from the date of these presents, to learn the arts or professions of a surgeon, apothecary and accoucheur.

Covenant by apprentice to serve.

2. The said [*apprentice*] will serve the said [*master*] well and truly during the said term in the arts or professions aforesaid,

[1] The apprentice in this case is of age ; if he is an infant, his father or guardian will covenant on his behalf, see *ante*, p. 435.

and not do or commit any damage, default or waste to his said master or his business or affairs, nor knowingly suffer the same to be done or committed if within his power to prevent it, nor without immediately giving notice to the said [*master*], but will behave and demean himself as a true and faithful apprentice in all respects.

Master accepts apprentice.

3. In consideration of the premises and of the premium or sum of £ paid by the said [*apprentice*] to the said [*master*] upon the execution of these presents (the receipt whereof is hereby acknowledged), and of the further sums of £ and £ respectively to be paid by the said [*apprentice*] to the said [*master*] at the time and in the events and manner hereinafter mentioned, the said [*master*] will take and accept the said [*apprentice*] as such apprentice as aforesaid for and during the said term, and will teach and instruct him in the arts or professions aforesaid, and in all matters and things incident or relating thereto, as are now or shall be hereafter practised by him the said [*master*], and to the best of his skill, knowledge and ability.

Master will provide board, &c.

4. The said [*master*] will find and provide the said [*apprentice*] with good and sufficient board at the table of him the said [*master*], and with suitable lodging; and also with medicine and medical attendance, except as regards fees for advice or attendance of any physician or surgeon other than the said [*master*], which it is hereby agreed shall be paid by the said [*apprentice*] himself.

Liberty to apprentice to walk hospitals.

5. The said [*apprentice*] shall, during the last years of the said term, for days in every week at the least, be at liberty without let or hindrance of or by the said [*master*], to walk or resort to the Hospital, or some other hospital or hospitals to be selected by the said [*apprentice*] with the approval of the said [*master*], and to attend lectures on medicine, surgery and chemistry, and other subjects relating to or connected with the arts or professions hereinbefore mentioned, or any of them.

Further premium to be paid by instalments.

6. The said [*apprentice*] shall pay to the said [*master*] the further premium or sum of £ by the instalments, at the times and in the events and manner following, that is to say, on the day of , 19 , the first instalment thereof being the sum of £ , and on the day of , 19 , the residue of the said premium being the sum of £ : PROVIDED ALWAYS, that at the time appointed for payment of the instalment then payable the said [*apprentice*] and the said [*master*] shall then both be living, and the said [*master*] shall then be in actual practice as a surgeon, apothecary and accoucheur, and shall have duly observed and performed the covenants herein contained and on his part to be observed and performed, and shall not then have become bankrupt nor made nor entered into any composition, or liquidation, or assignment for the benefit of creditors, or scheme for the arrangement of his affairs within the provisions of the present or any future Bankruptcy Act for the time being in force.

IN WITNESS, &c.

Apprentices (Sea).—The apprenticing of boys to the sea service has been the subject of legislation since 1703, when a statute of Anne (2 & 3 Anne, c. 6) provided that boys chargeable to parishes should be apprenticed by guardians, with the consent of magistrates, to British ships, at the age of ten years until the age of twenty-one, and made it compulsory for shipmasters to take on board a number of them, proportioned to the tonnage of the ship. It also allowed parish boys, who had been bound apprentices under the Poor Law Statute of Elizabeth, 1601, 43 Eliz. c. 2, s. 5, to be assigned and turned over to the sea, their assignment being duly registered. Such apprentices were exempted from impressment till they were eighteen years of age, and voluntary apprentices were exempted for three years from the time of their going to sea. Another statute in 1705 (4 Anne, c. 19) raised the age for compulsorily received apprentices to thirteen years, and made the exemption from naval service cease in all cases at eighteen years, except in the case of voluntary apprentices who had not been to sea before (5 & 6 Will. IV. c. 19, 1835; and 30 & 31 Vict. c. 59, 1867). These Acts are now repealed, but an Act of 1740 (13 Geo. II. c. 17) continues these exemptions to the present day, exempting all persons under eighteen years of age, and providing that every person who, not having before used the sea, shall bind himself apprentice to serve at sea, shall be freed and exempted from being impressed for the full space of three years from the time of his binding himself apprentice. Apprentices have made good this exemption in several instances, their remedy for wrongful impressment being either by suing out their *habeas corpus* (*q.v.*), or by application to the Chief Justice of the King's Bench for a warrant for their discharge (*The Apprentices Case*, 1779, 1 Leach, 203, Lord Mansfield; *R.* v. *Edwards*, 1798, 7 T. R. 745, Lord Kenyon). An Act of the last reign (1844, 7 & 8 Vict. c. 112, s. 37), repealing the Act of 1835, which repealed the first statute of Anne above given, continued the compulsory employment of apprentices at sea in proportion to the tonnage of ships; but this was finally put an end to in 1849 (12 & 13 Vict. c. 29). Settlement for poor law purposes by apprenticeship to sea service was abolished in 1834 (4 & 5 Will. IV. c. 76, s. 67).

The position of sea apprentices is now chiefly governed by the Merchant Shipping Act, 1894. By this Act mercantile marine superintendents are to assist and facilitate the making of apprenticeships (ss. 105 and 247). Apprenticeships of poor boys by boards of guardians, or persons exercising their powers, are to be made in the same manner and subject to the same laws and regulations as other apprenticeships made by them (s. 106); and every indenture of such apprenticeships is to be executed by the boy and the person to whom he is bound, in the presence of and attested by two justices of the peace, who are to ascertain that the boy is twelve years of age and of sufficient health and strength, and that the person to whom he is bound is a proper person for the purpose (s. 107). Every indenture of apprenticeship to the sea service is to be executed in duplicate and to be exempt from stamp duty, one indenture being kept and recorded by the proper shipping officer, and the other being indorsed by him with the fact of its having been recorded and then re-delivered to the master of the apprentice; and the master is to notify to the shipping officer any assignment or cancellation of the indenture, or the death or desertion of the apprentice (s. 108). The form is given below. In the case of a foreign-going ship,

the master must make any apprentice who is to go to sea with him appear before the superintendent before whom the crew are engaged, and must produce to him the indenture and any assignment of it; and the name of the apprentice, with the date of the indenture and its assignments, if any, and the names of the ports at which they have been registered, are to be entered on the agreement with the crew (s. 109). Only persons licensed by the Board of Trade, or owners, masters, or mates of ships, or regular servants of the shipowner, or superintendents, may engage or supply apprentices (or seamen), and the fees specified by the Act are the only remuneration allowed for so doing (ss. 111, 112). These statutory provisions do not apply to the case of ships belonging to the three general lighthouse authorities, or pleasure yachts (s. 262), nor to any fishing boats, whether exclusively or not employed on the coasts of the United Kingdom (s. 263 (2)). The provisions of the Employers and Workmen Act, 1875, 38 & 39 Vict. c. 90, have been applied to seamen and apprentices to the sea service since 1880 (43 & 44 Vict. c. 16, s. 11).

Apprentices are not "seamen" within the meaning of the M. S. A., 1894 (s. 742), but they are subject to the same discipline and liabilities, and enjoy the same rights and protection as regards their wages, property, and service (see generally, Part II. of the Act, and SEAMAN). Like them, they can sue the ship *in rem* for their wages, and perhaps also for the penalty expressed in the indenture of apprenticeship, though they could not before the Judicature Act (*The Albert Crosby*, 1860, Lush. 44). Any Court which takes cognisance of any dispute between master and apprentice may rescind the indenture if it seem unjust (s. 168); and there is an implied obligation in every instrument of apprenticeship that the shipowner will use all reasonable means to secure the seaworthiness of the ship (s. 458). There are also apprentices to the *sea-fishing* service, who, like sea apprentices, were at one time exempted from impressment (1810, 50 Geo. III. c. 108, s. 2), but are not so now (1868, 31 & 32 Vict. c. 45, sched.). Their position is now defined by the M. S. A., 1894, which applies the following provisions to fishing boats of 25 tons tonnage and upwards (this, it is presumed, means that only such boats can carry apprentices). No boy under thirteen years of age can enter into an indenture of apprenticeship or agreement with respect to the sea-fishing service; no boy under sixteen years is to be taken to sea in that service unless he is bound by an indenture or agreement made as the Act directs (the form is given by Order in Council of 12th Dec. 1894, Scrutton, M. S. A., Appendix xiii.; Stat. R. & O., 1904, "Merchant Shipping," p. 186; and see note at end of Precedents), and in the latter case he is called a sea-fishing boy. No board of guardians is to allow an apprenticeship to be entered into except in conformity with the Act; but a boy under sixteen may be employed in a fishing boat, if he is not obliged to remain in that employment longer than one day, and no written agreement has been made with him. Mercantile marine superintendents are to assist the making of such apprenticeships and agreements, which are to be made before a superintendent, who is to be satisfied that they are in accordance with the Act, that the master is a fit person for the purpose, that the boy is not under thirteen, and is of sufficient health and strength, and that his nearest relatives or guardian, if any, agree, and is then to indorse the indenture to that effect. Such indentures and agreements are to be executed in triplicate, one of which is to be kept by the master, one by the boy, and

another by the superintendent, and are exempt from stamp duty. The superintendent or his successor may enforce the indenture or agreement on behalf of the boy against the master, and no money is to be taken from either party for the making of such apprenticeships and agreements (ss. 392-398). Another class of sea apprentices are *pilot apprentices*, who are subject to the bye-laws and regulations of the pilotage authorities (M. S. A., 1894, s. 582). Fishing apprentices stand generally in the same position as seamen in fishing boats as regards discipline and wages (ss. 376-391). See FISHING BOATS.

[Maude and Pollock, *Merchant Shipping*, i. p. 165, 4th ed. (1881).]

PRECEDENT.

ORDINARY INDENTURE OF APPRENTICESHIP TO SEA SERVICE.

(*Official.*)

THIS INDENTURE, made the day of , 19 between [*Apprentice*], aged years, a native of , in the county of , now residing at , of the first part, [*Master*] of * , in the county of , of the second part, and (1) [*Surety*] , of , in the county of , of the third part, WITNESSETH, That the said [*Apprentice*] hereby voluntarily binds himself Apprentice unto the said [*Master*] , his Executors, Administrators, and Assigns, for the term of years, from the date hereof; And the said Apprentice hereby covenants that, during such time the said Apprentice will faithfully serve his said Master, his Executors, Administrators, and Assigns, and obey his and their lawful commands, and keep his and their secrets, and will, when required, give to him and them true accounts of his or their goods and money which may be committed to the charge, or come into the hands, of the said Apprentice; and that the said Apprentice will not, during the said term, do any damage to his said Master, his Executors, Administrators, or Assigns, nor will he consent to any such damage being done by others, but will, if possible, prevent the same, and give warning thereof; and will not embezzle or waste the goods of his Master, his Executors, Administrators, or Assigns, nor give or lend the same to others without his or their licence; nor absent himself from his or their service without leave; nor frequent Taverns or Alehouses, unless upon his or their business; nor play at unlawful games: IN CONSIDERATION WHEREOF, the said Master hereby covenants with the said Apprentice, that during the said term he, the said Master, his Executors, Administrators, and Assigns, will and shall use all proper means to teach the said Apprentice or cause him to be taught the business of a Seaman, and provide the said Apprentice with sufficient Meat, Drink, Lodging, Washing, Medicine, and Medical and Surgical Assistance, and pay to the said Apprentice the sum of £ , in manner following; (that is to say),

* Full address.

(1) If there is a surety his name is to be inserted here; but a surety is not essential. If there is not one, the part relating to him should be struck out.

the said Apprentice providing for himself all sea-bedding, wearing apparel, and necessaries (except such as are hereinbefore specially agreed to be provided by the said Master): AND IT IS HEREBY AGREED, that if, at any time during the said term, the said Master, his Executors, Administrators, or Assigns provide any necessary apparel, or sea-bedding for the said Apprentice, he and they may deduct any sums properly expended thereon by him or them from the sums so agreed to be paid to the said Apprentice as aforesaid: and for the performance of the Agreements herein contained, each of them, the said [*Master*] and [*Apprentice*] doth hereby bind himself, his Heirs, Executors, and Administrators, unto the other of them, his Executors and Administrators, in the penal sum of £ ;(2) and for the performance of the covenants on the part of the said Apprentice herein contained, the said [*Surety*] , as surety, doth hereby bind himself, his Heirs, Executors, and Administrators, unto the said [*Master*] , his Executors and Administrators, in the penal sum of £ : Provided, that notwithstanding the penal stipulations herein contained, any Justice or Justices of the Peace may exercise such jurisdiction in respect of the said Apprentice as he or they might have exercised if no such stipulations had been herein contained.

(2) See note (1).

In witness whereof, the said parties have hereunto set their hands and seals, the day and year above written.

Signed, sealed, and delivered, in the presence of

Place of the Seal.

_____(Master.)

Place of the Seal.

_____(Apprentice.)

Place of the Seal.

_____(Surety.)

Registered at the Port of this day of 19 .

Signed

NOTE.—*This Indenture must be executed in duplicate; both copies must be taken within seven days after execution either to the Registrar-General of Shipping and Seamen, Carlisle Place, Westminster, London, W., or, if in the Outports, to the Superintendent of the Mercantile Marine Office. One copy will then be retained and recorded, and the other returned to the Master with the necessary indorsement.*

[*The Board of Trade supply Forms of Apprenticeship for the Sea-Fishing Service. The official Form is the only one which may be used.*]

Appropriation of Payments.—1. A debtor may owe a creditor various sums of money for debts contracted at different dates, and secured in different ways, as by mortgage, bond, covenant, or bill of exchange. On some of these he may be only a joint debtor; on others there may be a surety liable on his default. If the debtor make a payment to the creditor not sufficient to discharge the whole of his indebtedness, he has the right of determining how his money shall be applied; he may appropriate the payment to cancelling whichever debt he pleases. He may say: "I wish with this money to pay off the debt for which A. is my surety;" and though the creditor would much prefer that some other debt for which the debtor alone is liable should be paid off first, he cannot prevent the debtor's right to apply the payment to that particular demand.

The debtor must notify his intention before or at the time of payment (*Mayfield* v. *Wadsley*, 1824, 3 Barn. & Cress., at p. 362); though such notification need not be express; it will be sufficient if the intention of the debtor can be inferred from his previous conduct, or subsequent declarations, or is clearly indicated by any other circumstances (*Newmarch* v. *Clay*, 1811, 14 East, 238, 243).

2. If, however, the money be paid by the debtor *generally*—that is, without any appropriation to a particular debt—the right of appropriation passes to the creditor. *He* now in his turn may apply the payment to any debt he pleases, even to one purely equitable, provided it be of agreed and ascertained amount (*Bosanquet* v. *Wray*, 1816, 6 Taun. 597; 16 R. R. 677; *Goddard* v. *Hodges*, 1832, 1 Cr. & M. 33). He may appropriate the payment to a debt, the right of action for which is barred by the Statute of Limitations (*Mills* v. *Fowkes*, 1839, 5 Bing. N. C. 455); though such an appropriation by the creditor will not operate as an acknowledgment by the debtor to take the remainder of the debt out of the Statute of Limitations. But if an action has been brought on a debt and judgment given against the creditor on the ground that the debt is barred, the creditor cannot appropriate any subsequent payment to such debt (*Smith* v. *Betty*, [1903] 2 K. B. 317). So a creditor may appropriate the payment to any debt which, though not illegal in its nature, cannot be enforced by action by reason of some statutory prohibition; such as sec. 5 of the Dentists Act, 1878 (*Seymour* v. *Pickett*, [1905] 1 K. B. 715). But he may not appropriate the payment to an illegal debt, if there be also a legal one unpaid (*Wright* v. *Laing*, 1824, 3 Barn. & Cress. 165; 27 R. R. 313).

The creditor will generally appropriate the money to discharge the oldest unsecured simple contract debt for which the debtor alone is liable; and the law will not, in favour of a surety, direct the application of money, paid generally, to the discharge of the secured debt, without some circumstances to show that it was so intended (*Plomer* v. *Long*, 1816, 1 Stark. N. P. 153; *Williams* v. *Rawlinson*, 1825, 3 Bing. 71; 28 R. R. 584; *Henniker* v. *Wigg*, 1843, 4 Q. B. 792. And see *Mutton* v. *Peat*, [1899] 2 Ch. 556). Such cases as *Marryatts* v. *White*, 1817, 2 Stark. N. P. 101, and *Kinnaird* v. *Webster*, 1878, 10 Ch. D. 139, are practically overruled on this point by *City Discount Co.* v. *McLean*, 1874, L. R. 9 C. P. 692, 699; *Browning* v. *Baldwin*, 1879, 40 L. T. 248; 27 W. R. 644; and *In re Sherry*, 1884, 25 Ch. D. 692. Thus the surety on a promissory note, given to secure a loan to a member of a money club, cannot rely upon the monthly subscriptions and premiums paid by his principal, as

payments in reduction of his liability upon the note (*Wright* v. *Hickling*, 1866, L. R. 2 C. P. 199).

On this two distinct questions arise:—

(i.) How may the creditor exercise his right?

(ii.) Within what time must he exercise it?

(i.) The appropriation by the creditor need not be in express words so long as his intention is in fact communicated to the debtor. As Lord Macnaghten says in *The Mecca*, [1897] A. C., at p. 294: "He is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention expressed or implied or presumed, and not any rigid rule of law, that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other, and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. But so long as the election rests with the creditor, and he has not determined his choice, there is no room, as it seems to me, for the application of rules of law." And when he has once so appropriated it, still if he has done this merely by a private entry in his own books, not communicated to the debtor, he can afterwards change his mind, and apply the payment to satisfy some other debt (*Simson* v. *Ingham*, 1823, 2 Barn. & Cress. 65; 26 R. R. 273).

(ii.) Next, within what time must the creditor exercise his right of appropriation? The debtor, as we have seen, must make his appropriation when he pays the money; but the creditor is not bound to appropriate it when he receives it. Practically, as the law stands, no limit of time is imposed on the creditor except by his own act, or by the judgment of a competent Court. If the creditor does in fact make a final election, and communicates this to the debtor, he cannot afterwards revoke his decision. Again, if he has obtained a judgment against the debtor, he can no longer alter the position by any subsequent attempt at appropriation. It was formerly held in *Griggs* v. *Cocks*, 1831, 4 Sim. 438; 58 E. R. 163, that the creditor must make the appropriation before the jury was sworn; but this case is no longer law. In *Seymour* v. *Pickett*, [1905] 1 K. B. 715, the creditor appropriated a payment to a particular debt while he was giving evidence in the witness-box; and the Court of Appeal held that he was entitled to do so. As Lord Macnaghten says in *The Mecca*, [1897] A. C., at p. 294: "It has long been held, and it is now quite settled, that the creditor has the right of election 'up to the very last moment.'" In *Seymour* v. *Pickett*, *supra*, at p. 727, Stirling, L.J., commenting on the phrase "up to the very last moment," said: "That, I think, means until something has happened which prevents the creditor from exercising his right—some such event as, for instance, if the creditor has already made an appropriation and has communicated it to the debtor. By bringing an action the creditor may in fact show that he has made an appropriation, and the very form of the writ may show a communication of the appropriation to the debtor. And the same result may arise in other ways. In *Friend* v. *Young*, [1897] 2 Ch. 421, for instance, it was held that the form of a proof in bankruptcy by a creditor showed that an appropriation had been made by him, and amounted to a communication of it to the debtor. And in *Smith* v. *Betty*, [1903] 2 K. B. 317, an action was brought in

which the defendant pleaded the Statute of Limitations, and at the trial an order was made by which an account was directed in substance excluding statute-barred items, and it was held that the form of that order also prevented a subsequent appropriation by the plaintiff of a particular payment to statute-barred items. I do not profess to give an exhaustive account of the circumstances which may preclude a creditor from exercising his right of appropriation. All that it is necessary now to say is that, until something has happened which would render it inequitable for the creditor to do so, he is at liberty to exercise his right."

3. If neither debtor nor creditor appropriate the payment to a particular debt, the law will apply it first to the liquidation of any interest that may be due, and then to the discharge of the debt of earliest date standing unpaid at the date of the payment, unless there are circumstances to show that such could not have been the intention of the parties (*Hooper* v. *Keay & Draper*, 1875, 1 Q. B. D. 178). This is known as the rule in *Clayton's Case*, 1816, 1 Mer. 572, 608; 35 E. R. 781; 15 R. R. 161. But it does not apply between trustee and *cestui que trust*, though it may between two *cestuis que trustent* (*In re Hallett's Estate*, 1880, 13 Ch. D. 696; *Hancock* v. *Smith*, 1889, 41 Ch. D. 456; *In re Stenning*, [1895] 2 Ch. 433; see BANKER AND CUSTOMER); nor where there is no account current between the parties; nor where the transactions out of which the debts have respectively arisen are of the same date (*per* Lord Halsbury, L.C., in *The Mecca*, [1897] A. C., at p. 291); in the last case the law will apportion the payment between the different debts (*Favenc* v. *Bennett*, 1809, 11 East, 36; 10 R. R. 425). Moreover, the rule in *Clayton's Case, supra*, is never an inflexible rule of law; the circumstances may always be looked at to see if the proper inference is that the parties intended the transaction to fall within the rule. If from an account rendered, or other circumstances, it appears that the creditor intended to reserve his right to make an appropriation, the rule will not apply (*The Mecca*, [1897] A. C. 286).

Appropriation of Supplies.—It has long been the established rule for Parliament, in granting supplies, to appropriate them to specific purposes. The practice was introduced as early as the reign of Edward III., with the object of securing that the subsidies voted were in fact applied to the purposes intended by Parliament; the rule was also occasionally observed in the two immediately succeeding reigns, but it was not till after the Restoration that it became common, and not till after the Revolution that it became the invariable usage. With the exception of those items of the national expenditure which constitute the fixed charges on the Consolidated Fund, no payments of public money can lawfully be made until sanctioned by votes of the House of Commons, subsequently embodied in an Act of Parliament called the Appropriation Act, which, besides authorising the issue out of the Consolidated Fund of the necessary amount, appropriates the same, in the manner agreed upon in committee of supply, to the various services (the army, navy, civil service, etc.). To some extent, however, the appropriation is anticipated, for, as the Appropriation Act is not passed till the end of the session, when the financial arrangements for the year have been completed, and as it is necessary to make provision for current expenditure, two Acts, called Consolidated Fund Acts, are

usually passed earlier in the session, authorising the issue of certain sums on account; but these Acts are subsequently incorporated in the Appropriation Act, which specifies and appropriates the whole amounts granted throughout the year. The form of the appropriating clause now in use is as follows:—"All sums granted by this Act and the other Acts mentioned in Schedule (A) annexed to this Act [being the Consolidated Fund Acts referred to above] out of the said Consolidated Fund towards making good the supply granted to His Majesty . . . are appropriated and shall be deemed to have been appropriated as from the date of the first of the Acts mentioned in the said Schedule (A) for the services and purposes expressed in Schedule (B) annexed hereto." Till 1870 it was also customary to insert in each Appropriation Act a clause forbidding the application of moneys which had been voted to any use other than those specifically mentioned in the Act, but since that year this clause has been omitted, as it added nothing to the positive obligation on the executive to apply the sums voted to the particular purposes stated.

The necessity for thus annually voting, and by the Appropriation Act appropriating, the supplies granted by the House of Commons is one of the causes—the other being the passing of the Army Act—that render a yearly sitting of Parliament imperative. "The prorogation or dissolution of Parliament without an Appropriation Act is a constitutional irregularity, as thereby all the grants of the Commons are nullified, and the sums must be voted again in the next session before a legal appropriation can be effected" (May, *Parliamentary Practice*, 10th ed., 521).

The officer ultimately charged with the duty of seeing that the specific appropriations are effected is the Comptroller and Auditor-General.

[See Stubbs, *Consist. Hist.*, 1880 ed., vol. ii. 617; vol. iii. 283; Hallam, *Constit. Hist.*, 8th ed., vol. iii. 115; Todd, *Parly. Govt. in England*, ed. by Walpole, 1892, vol. ii. 229-234; Anson, *Law and Custom of the Constitution*, 3rd ed., part i. 288; part ii., 2nd ed., 338-343; May, *Parly. Prac.*, 10th ed., 519-521, 560-3.]

Appropriation of Water.—The effect of appropriating water flowing in a natural stream, with relation to the person taking it for use and other riparian proprietors, has been regarded differently in byegone times from the way in which it is regarded now. It used to be considered that flowing water was the property of no one, and that nobody had a right to complain if any owner of land adjoining a stream appropriated it for his own exclusive use, unless he was in some way using it at the time, and thus sustained damage from the act of his neighbour; and that by an act of appropriation any landowner might acquire water rights against all other riparian owners, which would continue until he abandoned his user (see *Williams* v. *Moreland*, 1824, 2 Barn. & Cress. 910; 26 R. R. 579). In process of time this theory was modified, and now it is considered that, independently of appropriation and user, all riparian owners have, from the mere fact of being riparian owners, certain rights in natural streams *ex jure naturæ*, and that they can maintain an action for any infringement of those rights (see *Mason* v. *Hill*, 1832, 5 Barn. & Adol. 1; 39 R. R. 354). In *Cocker* v. *Cowper*, 1824, 5 Tyrw. 103; 40 R. R. 626, Parke, B., is reported to have

said that the doctrine of appropriation had been much cut down in *Mason* v. *Hill, supra;* and in *Holker* v. *Porritt*, 1875, L. R. 10 Ex. 59, it is shown that, though appropriation of water of streams for use does not create any new rights, it will have the effect of increasing the damages recoverable for obstruction, as, in the absence of user, damages could only be nominal.

Water can be appropriated for use, not only as it flows along a surface stream, but also by collecting it in a well or other receptacle, and thus by taking actual possession of it. Water appropriated in this way does not become the property of the collector, and, if it is made to escape, he cannot sue for recovery of his property, for it has ceased to be his, though he may possibly have an action for damages in some other form; and if water naturally percolates through the soil to a well, in unknown and undefined streams, the fact of appropriation by this means does not give the owner of the well any cause of action against another person who, by mining or sinking another well, cuts off the spring or drains away the water (*Chasemore* v. *Richards*, 1859, 7 H. L. C. 349; 11 E. R. 140; *Acton* v. *Blundell*, 1843, 12 Mee. & W. 324; 67 R. R. 361). [The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement and there consume it for purposes unconnected with the tenement (*M'Cartney* v. *Londonderry & Lough Swilly Rly. Co.*, [1904] A. C. 301), over-ruling *Sandwich* (*Earl of*) v. *Great Northern Rly. Co.*, 1878, 10 Ch. D. 707. In the case of an artificial water-course, the origin of which is unknown, the proper inference from the user of the water and from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights (including the right to use the water for manufacturing purposes) as they would have had if the stream had been a natural one (*Sutcliffe* v. *Booth*, 1863, 32 L. J. Q. B. 136; *Baily & Co.* v. *Clark, Son & Morland*, [1902] 1 Ch. 649). The use of the water by a riparian proprietor for manufacturing purposes must be such as not to interfere with the use of the water by the other proprietors above or below him, or to inflict on them a sensible injury (case last cited, and *Miner* v. *Gilmour*, 1858, 12 Moo. P. C. 131, 156; 14 E. R. 861). In order to support an action for appropriating water flowing underground, the channel must be both defined and ascertained. If the existence of the underground channel cannot be ascertained or known without excavation, there is no right of action (*Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655).]

Approval, Sales on.—See Sale of Goods.

Approvement is where there exists a right of common on the lord's waste, and the lord encloses part of such waste for himself, leaving sufficient common with ingress and egress for the commoners (see Common; Williams on *Rights of Common*).

Approver (*Probator*).—An accomplice in treason or felony, who, on arraignment, confessed the fact before plea pleaded, took an oath to reveal all treasons and felonies he knew, and appealed or accused others, in order to obtain pardon (3 Co. Inst. 129; 3 Russ. on *Crimes*, 6th ed., 642; Hawk., P. C., bk. ii. c. 24). No person could be an approver who

was attainted or incapable of taking an oath or unable to wage battle (see Pollock and Maitland, *Hist. Eng. Law*, 631). Approvement has long fallen into disuse (2 Hale, P. C., 226), but the term "approver" is still used in Ireland of accomplices who turn King's evidence. See ACCOMPLICE.

Apt Words.—English law does not, as do some other systems, attach particular meanings or operation to certain technical words exclusively, so that no words of equivalent meaning, or periphrasis, can be used with the same effect. It looks at the meaning and sense of the words used, and the intention of the parties as indicated by the words, and not the actual words themselves (see Preston's *Conveyancing*, i. p. 182). But the use, especially in conveyancing, of common forms, phrases and words is eminently advisable; they have a well settled effect, and have, in many instances, been often construed by the Courts. The only important exceptions to the general rule are in regard to (1) words of limitation, (2) words which, in the absence of anything in the deed or agreement in which they are used to the contrary, imply certain covenants, and (3) certain words of art necessarily used in indictments.

1. An estate of inheritance could formerly be limited to an individual only by the use of the word "heirs," or "heirs of the body," or to a corporation sole by the use of the word "successor" (see Norton on the *Interpretation of Deeds*, some unimportant exceptions are there collected), but the Conveyancing Act, 1881, s. 51, permits the use of the words "in fee-simple" or "in tail." The same Act (s. 49) declares that the word "grant" need not necessarily be used in order to convey tenements or hereditaments, corporeal or incorporeal, and this appears to have been the law since the Real Property Act, 1845, 8 & 9 Vict. c. 106. (See the note to sec. 49 in Hood and Challis's *Conveyancing Acts*.)

2. At the common law, the use of the words "give" or "grant" (*concessi*) in a deed implied a warranty of title, but this implication was removed by the Real Property Act of 1845, s. 4. In conveyances by the promoters of an undertaking, under the Lands Clauses Act, 1845, the use of the word "grant" still implies covenants for title. The words "demise" or "grant" in a lease, if the lease contains no express covenant for title, imply a covenant for quiet enjoyment, limited to the term of the lessee's own estate (Sheppard's *Touchstone*, p. 165; *Baynes* v. *Lloyd*, [1895] 2 Q. B. 610). It has been held in some cases that any equivalent words of letting, and the use of these words, or of "demise," in a letting without any deed, will have the same implication, but these cases appear to be of doubtful authority. (See *Baynes* v. *Lloyd*, *supra*, where they are cited and discussed.) As to covenants implied in conveyances, mortgages and settlements, by parties conveying as "beneficial owner," "settlor," "trustee," or "mortgagee," see the Conveyancing Act, 1881, s. 7, and BENEFICIAL OWNER; FURTHER ASSURANCE; MORTGAGE.

3. In an indictment for felony the word "feloniously," and in indictments for murder, "murder," for burglary, "burglariously," and for rape, "ravish and carnally know" (*R.* v. *Warren*, 1832, 3 Russell on *Crimes*, 6th ed., 230), must be used. The words "felony," "murder," and "burglary" are words of art for which no equivalent expressions are permitted (*per* Parke, B., in *Holford* v. *Bailey*, 1848, 13 Q. B. 426; 78 R. R. 432; *R.* v. *Gray*, 1864, 33 L. J. M. C. 78).

Arbitrary Punishment.—Under English law punishments are not imposed at the absolute pleasure of the judge; but he has a limited discretion, except in cases of treason and murder, as to the punishment to be imposed. Except in the case of certain common-law misdemeanors, the punishment of all offences is now regulated by statute (as to felonies, see 7 & 8 Geo. IV. c. 28, s. 1). In the absence of a statutory limit a common-law misdemeanor is punishable by fine (and) or imprisonment without hard labour, for any time, at the judge's discretion. There is also at common law a power to add or substitute whipping, but that punishment is now never imposed, except under statutory authority (see Stephen, *Hist. Crim. Law*, i. 490; *re Forbes*, 1887, 8 N. S. W. Rep. Law, 68; *R.* v. *Castro*, 1880, 5 Q. B. D. 490, *per* Bramwell, L.J., at 509). By the Bill of Rights, 1688, 1 Will. & Mary, sess. 2, c. 2, it is declared that excessive bail (see BAIL) ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted. As to fines and punishments, this merely affirms unrepealed earlier Acts (Stat. Westm. First, 1275, 3 Edw. I. c. 6; Magna Charta, 1297, 25 Edw. I. c. 14; the Quarter Sessions Act of 1360, 30 Edw. I. c. 1; and the Petition of Right, 1627, 3 Chas. I. c. 1, s. 3). It was aimed at the severities practised by the Stuart kings, and is read as prohibiting resort to modes of punishment involving torture or recourse to black letter authorities. There are no decisions on words in the Bill of Rights in England. They appear in the Constitution of the United States and many States, and under them the validity of electrocution and execution by shooting have been contested. Where the punishment imposed is authorised by law, improper exercise of his discretion by the judge is remediable only by petition to the Crown through the Home Office for remission. If it is illegal, *and wholly without jurisdiction*, the judgment can be quashed by writ of error (*R.* v. *Castro*, *ubi sup.*), or, in the case of inferior Courts, by *habeas corpus* with *certiorari;* and the judge is liable to action or indictment (*Anderson* v. *Gorrie*, [1895] 1 Q. B. 668).

[As to the history of punishment in English law, see Pollock and Maitland, *Hist. Eng. Law*, ii. 449-520; Pike, *History of Crime*, *passim;* Stephen, *Hist. Crim. Law*, i. 457-492; *Picton's Case*, 1804-1812, 30 St. Tri. 225-883.]

Arbitration.

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DEFINITION.—ARBITRATION ACT, 1889.—Arbitration is the settlement of disputes by the decision, not of a regular and ordinary Court of law, but of one or more persons, who are called arbitrators. The English law relating to this subject is now contained in the Arbitration Act,

1889, 52 & 53 Vict. c. 49. This statute is an express code, and its application to arbitrations under previous Acts is only excluded where its provisions are absolutely inconsistent with such Acts (see *In re Knight & Tabernacle Permanent Building Society*, [1891] 2 Q. B. 63). It is also an amending and not a mere consolidating Act (see *Hurlbatt* v. *Barnett*, [1893] 1 Q. B. 77). The Arbitration Act, 1889, consists of two parts: (1) references by consent out of Court; (2) references by order of Court.

I. References by Consent out of Court.—*The Agreement.*—An agreement to determine disputes by arbitration is styled a "submission," and a submission to arbitration is defined by the Act of 1889 as "a written agreement to submit present or future differences to arbitration, whether to an arbitrator named therein or not." A submission to arbitration may be verbal. But if it is so, it does not come within the Act of 1889; and has, moreover, several other disadvantages. Its terms are open to dispute. It cannot be made a rule of Court so as to be enforced like a judgment. And in certain cases it would be ineffectual. For instance, if A. and B. agree verbally to refer to C. the question whether A.'s interest in certain land has determined, this submission would be voidable under sec. 4 of the Statute of Frauds.

A submission may be made by an agreement in writing, not under seal. Here a sixpenny stamp is necessary, except where the matter in dispute does not exceed £5 (see Stamp Act, 1891, 54 & 55 Vict. c. 39, 1st sched.). The agreement need not necessarily be signed by both parties (*Baker* v. *Yorkshire Fire and Life Assurance Co.*, [1892] 1 Q. B. 144). The submission may also be by mutual bonds, *i.e.* each party may execute a bond to the other in a certain penalty, subject to the condition of his abiding by and performing the award. Again, each party may execute a bond to the arbitrators. Or, lastly, the submission may be by deed containing mutual covenants to stand by the award.

A submission is an agreement to take the decision, and not the advice only, of the person or persons to whom the matter is to be referred. It is also necessary to distinguish an arbitration from a mere valuation. The former decides a difference which has arisen, while the object of the latter is to prevent a dispute from arising. The distinction is of practical importance, because, while the award of an arbitrator can be directly enforced (see *infra*), the decision of a valuer can only form the subject of an independent action (see *In re Carus Wilson & Greene*, 1886, 18 Q. B. D. 7). In that case, on the sale of land, one of the conditions of sale was that the purchaser should pay for the timber on the land at a valuation, and it was provided that each party should appoint a valuer, that the valuers so appointed should, before they proceeded to act, appoint by writing an umpire, and that the two valuers, or, if they disagreed, their umpire should make the valuation. The two valuers were unable to agree and the umpire made the valuation. It was held by the Court of Appeal that such valuation was not in the nature of an award on an arbitration, and that, therefore, an application to set it aside must be refused. There is this further distinction between an arbitrator and a valuer, that the former must act judicially and hear parties.

The capacity of parties to enter upon an agreement to go to arbitration is governed by the ordinary rules of law as to contractual capacity. See Contract. An agreement to arbitrate made by an infant is not void; but may be repudiated by the infant at his option. An

authorised agent, a solicitor, at least if clothed with general authority to act for his client in legal proceedings (but great caution is necessary; see *James* v. *Ricknell*, 1887, 20 Q. B. D. 164), counsel (see *Matthews* v. *Munster*, 1887, 20 Q. B D. 141), and the committee of a lunatic with the sanction of the Court in Lunacy (see LUNACY), may refer disputes to arbitration. Counsel cannot, however, refer an action against the instructions of his client (*Neale* v. *Gordon-Lennox*, [1902] A. C. 465). Every civil dispute, present or future, and the question of liability for such personal injuries as are actionable as well as indictable—for example, assault (see *Elworthy* v. *Bird*, 1825, 2 Sim. & St. 372; 57 E. R. 388), and nuisance (see *Dobson* v. *Groves*, 1844, 6 Q. B. 637; 66 R. R. 509)—could be referred by consent to arbitration. Not so, however, offences of a public nature (see *Keir* v. *Leeman*, 1844, 6 Q. B. 308; 66 R. R. 392), such as perjury (see *R.* v. *Hardey*, 1850, 14 Q. B. 529). A submission in writing is not at common law irrevocable. Prior to the Arbitration Act, 1889, the law on this subject stood as follows:—(1) A submission of existing or future disputes to two or more *named* arbitrators could be revoked by either party at any time before award, unless it contained an agreement that the submission might be made a rule of Court (see *In re Rouse & Meier*, 1871, L. R. 6 C. P. 212; *Deutsche Springstoff Actien Gesellschaft* v. *Briscoe*, 1887, 20 Q. B. D. 177). (2) A particular submission, containing the rule of Court provision, could at any time, even after award (see *Pownall* v. *King*, 1801, 6 Ves. 10; 31 E. R. 912), be made a rule of Court, and was therefore irrevocable, except by the leave of the Court or a judge (9 Will. III. c. 15, and 3 & 4 Will IV. 42). (3) An agreement by deed or in writing to refer existing or future differences to arbitrators *not named* might at any time be made a rule of Court, unless a contrary intention appeared in the instrument—*e.g.* where the agreement provided that the decision of the arbitrator should be without appeal (see *Wadsworth* v. *Smith*, 1871, L. R. 6 Q. B. 332)—and was not revocable (*Piercy* v. *Young*, 1879, 14 Ch. D. 200; *Fraser* v. *Ehrensperger*, 1883, 12 Q. B. D. 310), and might be enforced under the Common Law Procedure Act, 1854, s. 11. These distinctions, which gave rise to considerable practical difficulty, are got rid of by the Act of 1889, which provides that a submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court (s. 1). A submission may be enforced in various ways. An action may be brought against the party refusing to proceed with the arbitration, for which it provides, and damages may be claimed. Only nominal damages will, however, be generally recoverable, unless in the original contract refusal to arbitrate was made to involve payment of a sum named as liquidated damages. A submission will not be enforced by a decree for specific performance, nor by injunction. But, while a submission cannot very readily be enforced by action, there are indirect means by which the Court can compel parties to carry it out: (1) the submission may be enforced by allowing the arbitrator to proceed *ex parte*, and giving effect to his award when made; or (2) the Court may stay proceedings brought to determine matters which come within the scope of the arbitration.

(1) Where the reference is to a single arbitrator, and difficulty arises in securing the concurrence of any party to his appointment, the appointment may be made by the Court itself. Where the reference is to two

arbitrators, the party refusing to appoint will be obliged to accept the appointment made by his opponent (Act of 1889, ss. 5 and 6). The arbitrator so appointed gives notice to the party who has refused to concur in his appointment, and if this notice is of no avail he proceeds to try the case *ex parte*, and to make his award. (2) Under sec. 4 of the Arbitration Act, 1889, if any party to a submission commences any legal proceedings in any Court against any other party to the submission, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance (*q.v.*) and before delivering any pleadings, or taking any other step in the proceedings, apply to that Court to stay them. A "step in the proceedings" within the section means some application to the Court by summons or motion, and does not include an application from one party to another (*Ives & Barker* v. *Willans*, [1894] 1 Ch. 68; [1894] 2 Ch. 478), or an application by letter for an enlargement of time for putting in a defence (*Brighton Marine Palace and Pier* v. *Woodhouse*, [1893] 2 Ch. 486), or the requiring of the delivery of a statement of claim (*Ives & Barker* v. *Willans, supra*), or the mere filing of affidavits in answer to a motion for a receiver in an action for a dissolution of partnership (*Zalinoff* v. *Hammond*, [1898] 2 Ch. 92). An agreement to refer disputes to a foreign Court may be a "submission" within sec. 4 of the Arbitration Act, 1889 (*Austrian Lloyd S.S. Co.* v. *Gresham Life Assurance Society*, [1903] 1 K. B. 249). But the taking out of a summons for time for delivery of defence is such a "step" (*Bartlett* v. *Ford's Hotel Co.*, [1895] 1 Q. B. 850; [1896] App. Cas. 1), and so is an application for leave to administer interrogatories (*Chappell* v. *North*, [1891] 2 Q. B. 252), or the attendance of the defendant at chambers on the hearing of a summons for direction, on which an order is made, that the plaintiffs and defendant should each make discovery of documents (*County Theatres and Hotels Co.* v. *Knowles*, [1902] 1 K. B. 480; *Steven* v. *Buncle*, [1902] W. N. 44; *Richardson* v. *Le Maitre*, [1903] 2 Ch. 222). In order to induce the Court to make an order staying proceedings under this section the application must be made in time, and the applicant must satisfy the Court that at the time when the proceedings were commenced he was, and that he still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. The Court must also be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission. A stay of proceedings must be refused on such grounds as these, that the validity of the agreement to submit to arbitration is itself in question (see *Kitts* v. *Moore*, [1895] 1 Q. B. 253), or that there is some serious objection to the fitness of an arbitrator, or that the applicant is simply aiming at delay, or that the party who resists is accused of fraud (cf. *Barnes* v. *Young*, [1898] 1 Ch. 414), or that the point in dispute in the proceedings is a question of law not involved in the facts which form the subject of the submission. The Court will generally stay proceedings where a contract contains a clause making arbitration a condition precedent to the right to bring an action (see *Scott* v. *Avery*, 1856, 5 H. L. C. 811; 10 E. R. 1121; *Spurrier* v. *La Cloche*, [1902] A. C. 446). Such clauses are constantly found in policies of insurance, and are expressed in such terms as these: "The party insured shall not be entitled to commence or maintain any action at law, or suit in equity, upon his policy until the amount of the loss shall have been referred and determined, as hereinbefore provided, and then only for the amount so awarded." In the case of *Viney* v.

Bignold, 1887, 20 Q. B. D. 172, from which the above clause is taken, the Court held that arbitration must precede an action, and Wills, J., laid down the principles of construction applicable to such clauses in the following terms:—"If there is a covenant to pay the amount of the loss, accompanied by a collateral provision that the amount shall be ascertained by arbitration, such arbitration is not a condition precedent to the maintenance of an action on the covenant; but if the parties have covenanted that the liability is only to arise after the amount has been adjusted by arbitration, then such adjustment is a condition precedent to the right to recover." In some cases, however, the Court has refused to interfere, leaving the defendant to plead the condition as a defence. See further the following cases:—*Manchester Ship Canal Co.* v. *Pearson*, [1900] 2 Q. B. 606; *Parry* v. *Liverpool Malt Co.*, [1900] 1 Q. B. 339. The Court has power to rescind an order to refer an action consented to by the counsel to one of the parties to the action without the authority of his client, even though the want of authority is not communicated to the other side (*Neale* v. *Gordon-Lennox*, [1902] A. C. 465).

The Arbitrator is a person selected by the mutual consent of the parties to determine a dispute, or matters in controversy, between them. As a single arbitrator is selected by the parties themselves, the question of his eligibility for the office is not one of the greatest prominence or importance. It has been said that if the parties chose to appoint a lunatic to determine their disputes the appointment would be valid, but this dictum is of more than questionable authority (see Bryd. 58). Apart from such an extreme case, however, there is no doubt that the Courts are unwilling to set the appointment of arbitrators aside lightly, where the choice has been made by both parties with their eyes open. In contracts of works there is commonly a provision, that the engineer (see ENGINEER) shall be the arbitrator in any dispute between the contractor and his own employer. The practical effect of this provision is to make the engineer judge in his own cause; but the Courts will not prevent him from acting where the contractor was aware of the facts when he signed the contract, unless it is shown, not merely that he has already formed an opinion on the dispute, but that there is every probability that he will be guilty of some misconduct in the matter of the arbitration, and, in short, will not act fairly (*Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667; *Ives & Barker* v. *Willans*, [1894] 2 Ch. 478; and *Jackson* v. *Barry Railway Company*, [1893] 1 Ch. 238).

Where a barrister had been appointed arbitrator, the Court refused to stay the arbitration on the allegation that the arbitrator had intimate professional relations with the firm of solicitors, the conduct of one of whom was in question in the arbitration (*Bright* v. *River Plate Construction Co.*, [1900] 2 Ch. 835).

No form is prescribed for the appointment of an arbitrator. The language used should, however, clearly specify (*a*) his name and description, and (*b*) the difference or differences which he is to decide. The Arbitration Act, 1889, contains provisions for the appointment of arbitrators when a party declines to nominate an arbitrator, or the arbitrator nominated refuses to act, or becomes incapable of doing so. The machinery varies according as the reference is to a single arbitrator or to two arbitrators.

Reference to a Single Arbitrator.—If the submission does not state

whether the reference is to be to a single arbitrator or more than one, sched. 1 (*a*) of the Act of 1899 applies, and the reference is deemed to be a reference to a single arbitrator. In any of the following cases:—(*a*) where all the parties do not, after differences have arisen, concur in the appointment of an arbitrator; or (*b*) where an appointed arbitrator refuses to act, or is incapable of acting (see *In re Wilson & Son and The Eastern Counties Navigation Co.*, [1892] 1 Q. B. 81), or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy, any party may serve the other parties with a written notice to appoint an arbitrator—no particular arbitrator need be named in the notice (*In re Eyre* v. *The Corporation of Leicester*, [1892] 1 Q. B. 136). If the appointment is not made within seven clear days (see CLEAR DAYS) after the service of the notice, the Court or a judge may, on application by summons in Chambers by the party who gave the notice, appoint an arbitrator, who has the like power to act in the reference, and make an award as if he had been appointed by consent of all the parties (s. 5).

Reference to Two Arbitrators.—Here, where either of the appointed arbitrators refuses to act, the party who appointed him may appoint a new arbitrator in his place. If, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party giving such notice may appoint his nominee sole arbitrator in the reference, and his award will be as binding on the parties as if he had been appointed by consent. The Court or a judge may, however, set aside any appointment made in pursuance of this provision (s. 6). *Semble* there is no power to compel the parties to nominate when the submission is to more than two arbitrators (*In re Smith and Nelson's Arbitration*, 1890, 25 Q. B. D. 545). Where a party refuses to recognise an arbitrator validly appointed, the arbitrator, unless removed by the Court, will proceed to act *ex parte* (Act of 1889, s. 11).

Duties of Arbitrator.—The duties of an arbitrator are to try the case submitted to him impartially, and to exercise such skill or discretion as he possesses in deciding it correctly. These duties rest equally upon single and upon two or more arbitrators. An arbitrator is not liable to be sued for want of skill or negligence in the conducting of the arbitration (*Pappa* v. *Rose*, 1872, L. R. 7 C. P. 525). Where, however, he is a party to the submission, he may incur legal liability by refusing to act (*ibid.* 527). For misconduct, as already stated, he may be removed by the Court.

Remuneration of Arbitrator.—The better opinion appears to be that an arbitrator cannot sue for his fees, unless upon an express promise to pay them (see *Hoggins* v. *Gordon*, 1843, 3 Q. B. 466). In *Crampton* v. *Ridley*, 1887, 20 Q. B. D. 48, however, A. L. Smith, J., expressed a strong view that in a commercial arbitration, at least, there is an implied contract to pay the arbitrators (and umpire) reasonable remuneration for their services. An arbitrator is not, however, without protection in regard to his fees. He may retain the award till his fees are paid; and it seems that an arbitrator, on refusing to give up an award, except upon payment of an extortionate fee, cannot be attached for contempt. The proper course for the party from whom such a fee is demanded, is either to pay it and sue the arbitrator for money had and received (*Dosset* v.

Gingell, 1841, 2 Man. & G. 870; 58 R. R. 593), or to apply to the Court to set the award aside, on the ground that the charges are so excessive as to amount to misconduct on the part of the arbitrator (see *infra*). The lien of an arbitrator covers the award, the submission, and any documents containing information which he himself has procured, or caused to be procured, but not papers put in evidence by the parties. In the course of the reference an arbitrator may himself fix the amount of his remuneration and costs, if the submission does not otherwise provide, and if the amount is named in and as part of the award (*In re Stephens & Co. and Liverpool and Globe Insurance Co.*, 1892, 36 Sol. J. 464; and see Act of 1889, sched. 1, subs. (i.)). Where, however, the amount is not specified in the award, but is contained, *e.g.* in a separate notice given to the parties, the Master must tax the costs and remuneration (*In re Prebble and Robinson*, [1892] 2 Q. B. 602), and, even where the amount of the costs and remuneration is stated in the award, the Court may, as above stated, set the award aside, if the charges are so excessive as to constitute misconduct on the part of the arbitrator.

Authority of Arbitrator.—As to what matters may be referred to arbitration, see *ante*. The authority of an arbitrator largely depends on the terms of the submission, and the question whether matters in dispute are within the reference is one for the Court to determine (*Piercy* v. *Young*, 1880, 14 Ch. D. 200), unless the parties have agreed to leave it to the arbitrator himself. Under a reference of (*a*) *pendente lite*, "all matters in the cause," the authority of an arbitrator would be limited to the points in dispute between the parties in that litigation; (*b*) "all matters of difference," the award might cover all disputes between the parties down to the time of the submission, and even of the award. In the absence, however, of express or implied authority, an arbitrator cannot adjudicate on claims which have not arisen at the time when the award is made (see *Barnardiston* v. *Fowler*, 1714, 10 Mod. 204). In *Piercy* v. *Young*, *supra*, it was held that an arbitration clause in articles of partnership, that "any differences or disputes which may arise between the partners shall be settled by an arbitration," did not cover a dispute as to whether a purchase of certain property was made on behalf of the firm, the *ratio decidendi* being, that as the matter in controversy was, whether a partnership existed with reference to the property in question, the dispute was not one arising "between the partners." In *Turnell* v. *Sanderson*, 1891, 60 L. J. Ch. 703, one partner commenced an action for dissolution, on the alleged ground that the business could not be carried on except at a loss. The partnership deed provided for the reference to two arbitrators, of any difference arising between the partners in regard to the construction of the articles, "or to any division, act, or thing, to be made or done in pursuance thereof, or to any matter or thing relating to the said partnership or the affairs thereof." Kekewich, J., held that the question whether, under the circumstances, there should be a dissolution, was outside the authority of an arbitrator appointed under the clause, and refused to stay the action. And see *Joplin* v. *Postlethwaite*, 1890, 61 L. T. 629. *Semble*, however, a reference of "all matters in difference" would include power to award a dissolution (Lindley, *Partnership*, p. 456).

As to the cases in which an arbitrator may be called as a witness, see *infra*, *Setting aside Award*.

An Umpire.—If a reference is to two or more arbitrators, it is

inferred in the submission, unless the contrary is stated, that they may appoint an umpire at any time within the period during which they may make an award (Act of 1889, sched. i. (*b*)), and if the arbitrators have allowed their time for making an award to expire, or have delivered to any party to the submission, or to the umpire, a notice that they cannot agree, the umpire may forthwith enter upon the reference in lieu of the arbitrators (*ibid.* sched. i. (*d*)). Where the arbitrators do not appoint an umpire, or where the umpire selected cannot or will not act, the Court makes the appointment if, after notice by one party, the other refuses to concur in appointing an umpire. The umpire may be appointed in time to sit with the arbitrators, and hear the evidence, and thus save the parties time and expense in the event of a disagreement between the arbitrators. But he cannot take any part in the proceedings till the arbitrators disagree. An umpire, after having entered upon his duties, is, *mutatis mutandis*, in the same position, as to both rights and obligations, as an arbitrator.

Procedure on an Arbitration.—As regards all matters of procedure, the course of an arbitration is similar to that of an ordinary trial at law. The rules of evidence must be observed. Any party who thinks that an arbitrator has wrongly admitted, or rejected, evidence may move the Court to revoke the submission (*East and West India Docks* v. *Kirk & Randall*, 1887, 12 App. Cas. 738), or apply to the arbitrator (or, if he refuses, to the Court, for an order compelling him) to state a special case. The attendance of witnesses and the production of documents at an arbitration can be enforced on subpœna (Act of 1889, ss. 8 and 18). The evidence may, at the arbitrator's discretion, be taken on oath or affirmation (see OATH; OATHS), unless the submission provides to the contrary (s. 7 (*a*) and sched. i. (*g*)), and persons wilfully giving false evidence before an arbitrator are guilty of perjury (*q.v.*). The preparation of false evidence, to be used in an arbitration, is an indictable misdemeanor at common law, even although the arbitration does not, in fact, take place (*R.* v. *Vreones*, [1891] 1 Q. B. 360). If a point of law arises, the arbitrator may himself decide it, or state a case for the opinion of the Court (Act of 1889, s. 19), or put his award, or any part of it, in the form of a special case (s. 7 (*b*)). Either party may move the Court to compel an arbitrator to state a special case (s. 19). An arbitrator sometimes has a legal assessor to sit with him and advise him as to points of law. But he is not entitled to such assistance if the parties object (*Proctor* v. *Williamson*, 1859, 8 C. B. N. S. 386), and in any event—as in the case of a judge sitting with assessors—the decision must be his own. An arbitrator should not as a rule proceed *ex parte*. To this rule, however, there are several exceptions. Where any party, after receiving due notice of the date and place fixed for the hearing of the arbitration refuses to attend, the arbitrator should give him peremptory notice of the next appointment, and may then proceed *ex parte* on a second default. A similar course may be taken where any party refuses to recognise the authority of the arbitrator. Where there are two arbitrators, each should be present at the hearing, and an umpire, when he is appointed and enters upon the reference, is bound by the rules applicable to arbitrators.

The Award.—No special form is prescribed by the Act of 1889 for an award. The submission itself may contain directions as to the form which the award is to take, and these must be complied with. But,

in the absence of such directions, the arbitrator may himself determine the form in which his award is to be cast. Unless the submission otherwise provides, an award must be in writing (Act of 1889, sched. 1). Where the case is referred to the arbitration of three persons, "the award to be that of the said arbitrators or any two of them," it is necessary that they should execute the award together, since, if this requirement is not complied with, something might have occurred at the last moment to change the opinion of one or both of the arbitrators (see *Stalworth* v. *Innes*, 1844, 14 Mee. & W. 466, and *Wade* v. *Dowling*, 1854, 4 E. & B. 441). Under the Stamp Act, 1891, the following duties are payable on awards in England or Ireland:—

In any case in which an amount or value is the matter in dispute—

	£	s.	d.
Where no amount is awarded, or the amount or value awarded does not exceed £5	0	0	3
Where the amount or value awarded—			
Exceeds £5 and does not exceed £10	0	0	6
„ 10 „ „ 20	0	1	0
„ 20 „ „ 30	0	1	6
„ 30 „ „ 40	0	2	0
„ 40 „ „ 50	0	2	6
„ 50 „ „ 100	0	5	0
„ 100 „ „ 200	0	10	0
„ 200 „ „ 500	0	15	0
„ 500 „ „ 750	1	0	0
„ 750 „ „ 1000	1	5	0
„ 1000	1	15	0
In any other case	1	15	0

In the absence of any express provision in regard to the point in the submission, an award under the Arbitration Act, 1889, must be made in writing, within three months after the arbitrators have entered upon the reference, or have been called upon to act by notice in writing from any party to the submission, or on or before any later day to which they, by any writing signed by them, may from time to time enlarge the time for making the award (sched. 1 (*c*)). The Court has power to remit the matters referred to be reconsidered by the arbitrator (s. 10), and this power may be exercised even where he is *functus officio* (*In re An Arbitration between Stringer & Riley Brothers*, [1901] 1 K. B. 105). But query whether this can be done upon a counter-claim to an action upon an award (*Pedler* v. *Hardy*, 1902, 18 T. L. R. 591). The expression "called on to act" in this provision means called on to do anything as an arbitrator, and not merely called on to enter on the substantial business of the arbitration. It includes, for example, the appointment of an umpire (*Baring-Gould* v. *Sharpington Pick and Shovel Syndicate*, [1899] 2 Ch. 80, C. A.). Where an award is remitted by the Court to the arbitrator, his fresh award must be made within three months from the order of remittal, unless the Court otherwise orders (s. 10, subs. 2). The Court may also extend the time for making an award, even where the time fixed by the arbitrator has expired (see *Lord* v. *Lee*, 1868, L. R. 3 Q. B. 404; *Denton* v. *Strong*, 1874, L. R. 9 Q. B. 117; *May* v. *Harcourt*, 1884, 13 Q. B. D. 688; and *In re Dare Valley Railway Co.*, 1869, L. R. 4 Ch. 554)

Where the time for making an award is enlarged by the Court, the enlargement is deemed to be for one month unless a different time is

specified in the order (R. S. C., Order 64, r. 14 (*a*)). An umpire is required to make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on any later day to which the umpire may by writing, signed by him, enlarge the time. The effect of an award not being made in time depends upon circumstances. It may be prescribed by the parties themselves in the submission, and, even where the submission contains no express provision upon the point, the parties may waive any objections to the award on the ground that it is out of time, either expressly by a written agreement properly stamped, or impliedly by conduct (see the case of *Darnley* v. *London, Chatham, and Dover Railway*, 1867, L. R. 2 H. L. 43). It is scarcely necessary to observe that in the case of a submission to arbitrators who have appointed an umpire, failure on the part of the arbitrators to make their award gives the umpire jurisdiction to enter upon the reference and dispose of the case. An award must be (*a*) published and delivered, or made in accordance with the terms of the submission; (*b*) *intra vires* and at the same time a complete disposal of all the points submitted to the arbitrator (see in regard to these matters, *Duke of Buccleuch* v. *Metropolitan Board of Works*, 1870-72, L. R. 5 Ex. 221-229; L. R. 5 H. L. 418; *Harding* v. *Forshaw*, 1836, 1 Mee. & W. 415; 46 R. R. 333; *Samuel* v. *Cooper*, 1835, 2 Ad. & E. 752; 41 R. R. 520); (*c*) final, except as regards matters of mere valuation; (*d*) certain; (*e*) possible, consistent, and legal. So long as these provisions are complied with, an arbitrator may make his award in the alternative, affix to it any proper conditions, and give any directions, *e.g.* as to times and amount of payment, indemnities, releases, and conveyances. He may also, unless the submission expresses a contrary intention, correct in his award clerical mistakes or errors arising from any accidental slip or omission (Act of 1889, s. 7, overruling *Mordue* v. *Palmer*, 1870, L. R. 6 Ch. 22).

The arbitrator, it appears, has power to direct judgment to be entered in accordance with his award. Order 36, r. 55*c*, is in the following words: —"The provisions of rules 48 to 55 of Order 36, and of rule 55*b*, shall apply where any cause or matter or any question or issue of fact therein is referred to an officer of the Court, or to a special referee or arbitrator. Provided that where the arbitrator is appointed otherwise than by an order of the Court the provisions of rule 48 as to sitting *de die in diem* shall not apply." This rule applies Order 36, r. 50, to an arbitrator, with the sole exception that where he is appointed under submission and not by order, he is not compelled to sit *de die in diem*. He has, therefore, the same power to direct judgment as a judge of the High Court (see note "Arbitration under Submission," in *Annual Practice*, Order 36, r. 50).

The costs of the reference and the award are in the discretion of the arbitrators or umpire, who may direct to, and by whom, and in what manner, those costs, or any part thereof, are to be paid, and may tax or settle the amount of costs to be so paid, and award costs to be paid as between solicitor and client. It is stated, in Russell on *Arbitration*, 9th ed., p. 236 (and see authorities there cited), that, in the absence of any provision to the contrary in the submission, an arbitrator has implied power to deal with the costs incurred in an action referred to arbitration before it is so referred. See further, as to costs, *In re Collyer-Brislow & Co.*, [1901] 2 K. B. 839; *Malvern Urban Council* v. *Malvern Link Gas*

Co., 1900, 83 L. T. 326; *Street* v. *Street*, [1900] 2 Q. B. 57; *Carr Brothers* v. *Dougherty*, 1898, 67 L. J. Q. B. 371.

Setting aside an Award.—An award may be set aside on the following grounds:—

(1) Corrupt or irregular conduct on the part of the arbitrator, *e.g.* his refusal to postpone a meeting in order to let one party obtain counsel, when the other party has unexpectedly appeared by counsel; his permitting the examination of a party in the absence of the other party unless the irregularity is subsequently waived. In the case of *Gee* v. *Lomas* (*Times*, 25th July 1887), an arbitrator had made his award *bonâ fide* and on a misunderstanding, without consideration of certain statements which the defendant had at his request been preparing. The award was set aside (see also *In re Corn Trade Association*, L. N. 1888, p. 42). In the case of *Moseley* v. *Simpson*, 1873, L. R. 16 Eq. 226, A. and B., two arbitrators, lunched with C., who was a party to the arbitration, in the absence of D., the other party, during the proceedings. It was not shown that C. had attempted to influence A. and B. unduly. The Court held that, although the conduct of A. and B. had been highly improper, the award should not be set aside. An arbitrator does not *necessarily* misconduct himself by expressing an opinion on the subject-matter of the reference, before formally entering into it, even though the opinion is expressed in writing and is identical with the terms of the subsequent award (*Hutchinson* v. *Hayward*, 1866, 15 L. T. 291). Evidence of an admission out of Court that an arbitrator made his award improperly is not admissible in support of an application to set aside the award. The evidence of the arbitrator himself on the matter should be before the Court (see *In re Whiteley and Roberts' Arbitration*, [1891] 1 Ch. 558).

(2) A mistake on the part of the arbitrator, going to the root of the matter in issue, if the mistake either is admitted by the respondent to the appeal or appears on the face of the award.

(3) Fraudulent concealment of facts by one party, or wilful deception of the arbitrator, unless (see *Tullis* v. *Jacson*, [1892] 3 Ch. 441) the submission contained an agreement that neither party would attempt to set aside the award on the ground of fraud.

(4) Where the award lacks any of the requisites above stated, *e.g.* where it is uncertain, or not final, or *ultra vires*.

An award which is bad in part may be good for the rest, if the good is clearly separable from the bad. Instead of setting an award aside, the Court or a judge may remit it to the arbitrators or umpire for reconsideration. This course may be taken in cases of obvious defect, or omission, or mistake, or (see *In re Keighley & Co. and Durrant & Co.*, [1893] 1 Q. B. 405) where new evidence of a material character, which could not have been made available at the time of the reference by the party relying upon it has been discovered after the award was made.

Where it appeared in an action upon an award that the matters actually referred were those contained in the submission, it was held that the award was not bad (1) on the face of it, because it did not state that matters not referred had been rejected; (2) because the arbitrators had taken evidence on matters not referred but not shown to be irrelevant (*Falkingham* v. *Victorian Railway Commissioner*, [1900] A. C. 452).

Enforcement of an Award.—An award may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect (Act of 1889, s. 12). An application for leave of this kind is made by originating summons under Order 54, r. 4F, before a Master in Chambers. It should ask (*a*) for "leave to enforce the award dated in the above arbitration in the same manner as a judgment or order to the same effect;" or (*b*) for "leave to enforce the award dated in the above arbitration by entering judgment in accordance therewith" (see *Annual Practice*, notes to Arbitration Act, 1889, s. 12). It has been held that there is no jurisdiction to allow service out of the jurisdiction on foreigners, of a summons for the enforcement of an award (*Rasch & Co.* v. *Wulfert*, [1904] 1 K. B. 118). The application may be made at any time, even although the time for moving to set aside the award is not yet expired (see R. S. C., Order 42, r. 31 (*a*)). The party in whose favour the award is made may also sue upon it as upon a judgment or decree, and may, in some cases, obtain a decree for its specific performance. An action on an arbitrator's award may be brought by the successful party, notwithstanding that he has previously applied for and obtained an order to enforce the award under sec. 12 of the Arbitration Act, 1889 (*China Steam Navigation Co.* v. *Van Laun*, 1905, 22 T. R. 26). Disobedience to an award where, under the Arbitration Act, 1889, the submission has the effect of a rule of Court, may also be punished by committal for contempt (see CONTEMPT OF COURT). An award cannot be enforced by a stranger, nor is it binding upon him, although, as in the case of ordinary judgments and decrees, he is bound to recognise and respect the state of affairs which it has created between the parties. There is no direct appeal against awards. But, as already indicated, the intervention of the Court may be applied for to remove the arbitrator, or even restrain him from acting, or to revoke the submission, or to set aside or remit the award.

A variety of statutes contain provisions for the arbitration of legal questions arising under them. These will be dealt with under their proper heads. It may suffice to refer here to the Local Government Acts, 1888 and 1894; the Lands Clauses Acts; the Public Health Act, 1875 (see *Knowles* v. *Bolton Corporation*, [1900] 2 Q. B. 253); and the Lunacy Acts, 1890 and 1891.

II. REFERENCES BY ORDER OF COURT.—See REFERENCE OF ACTION BY ORDER.

See CHAMBERS OF COMMERCE; LONDON CHAMBER OF ARBITRATION; CONCILIATION; EMPLOYERS AND WORKMEN.

PRECEDENTS.

I. *AGREEMENT on a Purchase, between the Vendor and the Purchaser, to refer to* ONE ARBITRATOR *all Disputes existing or which may arise before the last Ten Days preceding the Arbitrator's first Sitting.*

AN AGREEMENT made the day of , BETWEEN [*vendor*], of &c., of the one part; and [*purchaser*], of &c., of the

Recital of agreement. That disputes existed between the parties. *Testatum.*

other part. WHEREAS by an agreement, dated &c. (*recite agreement for purchase, &c.*). AND WHEREAS disputes and differences exist between the said [*vendor*] and the said [*purchaser*], respecting the said agreement, and otherwise relating to the premises. NOW THESE PRESENTS WITNESS, that it is hereby agreed, as follows, that is to say:—

Disputes to be referred.

1. All disputes and differences which exist between the said parties respectively, or any of them; and also all other disputes and differences that may, at any time or times, before the last ten days immediately preceding the day which shall be appointed by the arbitrator hereinafter named, for his first sitting in the arbitration to be made in pursuance of these presents, exist between the said parties, or any of them, or any matters and things relating thereto, or arising out of the said agreement, shall be referred to the arbitration of [*arbitrator*], of &c.

Award, if made before a certain day, to be binding.

2. The award of the arbitrator, if made in writing under his hand and seal, ready to be delivered to the parties hereto, or if they or either of them shall be dead, to their or his executors, or administrators, on or before the day of next, or on or before such other day, not beyond the day of , as the arbitrator shall by writing under his hand from time to time appoint, shall be binding and conclusive on all the parties, and their heirs, executors, and administrators.

Reference to be made a rule of Court.

3. This reference or submission, and any award made in pursuance thereof, may be made a rule of the Queen's Bench [*or* Chancery] Division of Her Majesty's High Court of Justice, at the instance of any of the parties hereto, his executors, or administrators, without notice to the other or others of them.[1]

Parties to produce all deeds, &c.

4. The parties hereto, and each of them, or their or his heirs, executors, or administrators, shall produce to the said arbitrator, all deeds, evidences, books, accounts, vouchers, papers, documents, and writings, in the possession or control of them or him respectively, which the arbitrator may require as being, in his opinion, relative to the premises in question: AND shall, so far as in them or him respectively lies, do all such other acts and things as the arbitrator shall require, for better enabling him to make the said award.

Arbitrator may take evidence.

5. The arbitrator shall be at liberty to go into parol as well as written evidence; and to examine the parties in difference, or any of them, and such other witnesses as he shall think proper, on oath.

[1] Sometimes, instead of the clause providing that the reference, &c., shall be made a rule of Court, a penalty is imposed for revocation as follows:—

3. If either party to this reference or submission shall revoke, or attempt to revoke, the authority of the said [*arbitrator*], such party shall pay to the other party the sum of £ as liquidated damages; and the said [*arbitrator*] may and shall, at the request of such other party, proceed to determine and award concerning the matters hereby referred to him, notwithstanding any such revocation, or attempted revocation.

Statement of matters intended to be referred.

6. The solicitor of each of the said parties shall state in writing all the matters and things intended to be referred by his client to the arbitrator, and shall, at least ten days before the day appointed by the arbitrator for his first sitting on the arbitration, deliver a copy of such statement to the solicitor of each of the other parties respectively; and only those matters and things which shall be comprehended in such respective statements shall be taken into consideratton by the arbitrator.

Arbitrator to give notice of his first sitting.

7. The arbitrator shall give at least days' previous notice to the solicitor of each of the parties of the day on which he intends to hold his first sitting on the said arbitration.

Costs.

8. The costs of preparing and executing these presents, and a duplicate hereof, and all costs and charges attending the arbitration and award, shall be in the discretion of the arbitrator, and shall be paid and satisfied pursuant to his award; and the arbitrator may direct such costs to be paid as between party and party, or as between solicitor and client, as he shall think fit.

Parties not to bring action.

9. Neither of the parties, his heirs, executors, or administrators, shall bring any action or suit against the other of them, in relation to the premises, or against the arbitrator. IN WITNESS, &c.

II. *AGREEMENT to refer to* THREE ARBITRATORS *Matters of Account between a Creditor and Two Debtors, where a Balance is admitted to be due; Agreement to suspend an Action.*

Title of action.

IN THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION.
Between E. F. . . . . Plaintiff,
and
A. B. and C. D. . . Defendants.

Recital of dealings between parties;

WHEREAS there have been divers dealings and transactions between the above-named E. F. and A. B., before and since the day of , on which there was due and owing from the said A. B. to the said E. F. the sum of £ ; and there have been also divers dealings and transactions between the said E. F. and the said A. B. and C. D., since the said day of ;

disputes, and two suits, actions.

and several questions, disputes, and controversies have arisen, and are subsisting, not only between the said E. F. and the said A. B., but also between the said E. F. and the said A. B. and C. D.: And whereas there is now pending in the Queen's Bench Division of Her Majesty's High Court of Justice an action wherein the said E. F. is plaintiff, and the said A. B. and C. D. are defendants; and also an action in the Chancery Division of the same Court, in which the said A. B. and C. D. are plaintiffs, and the said E. F. is defendant, touching the said dealings and transactions, and the accounts relating thereto, in which last-mentioned action the said E. F. has filed a counter claim against the said A. B. and

Testatum.

C. D. NOW IT IS HEREBY AGREED by and among the said E. F., A. B., and C. D. as follows, that is to say :—

Agreement to refer.

1. All questions, disputes, and controversies, in anywise relating to or concerning such dealings or transactions, as well between the said E. F. and the said A. B. as between the said E. F. and the said A. B. and C. D., and the accounts relating thereto shall be referred to the award and determination of [*three arbitrators*], of &c.

Arbitrators may investigate accounts, and award a greater or less sum.

2. Notwithstanding the bond referred to in the statement of claim in the last-mentioned action, the arbitrators are to be at liberty to investigate the whole of the accounts, dealings, and transactions between the parties, and to award a greater or less sum to be due from the said A. B. and C. D., or either of them, jointly or separately, to the said E. F., and to determine the true balances between the said parties, upon the whole of the accounts, dealings, and transactions; And to appoint how and in what proportions such balances shall be paid, and by and to whom.

Actions to be discontinued and dismissed, with or without costs.

3. The arbitrators shall be at liberty to direct the said actions to be discontinued or dismissed, with or without costs; but if with costs, then to ascertain whether such costs are to be paid as between solicitor and client, or as between party and party; and when, and by and to whom they shall be paid.

Agreement to perform award.

4. The several parties hereto shall well and truly obey and perform the award of the arbitrators, or any two of them, touching and concerning the several matters hereinbefore particularly mentioned, as well as all other actions, causes of action, accounts, claims, and demands whatsoever, between or among the parties up to the date hereof; So as not to question the balance before stated to be due from the said A. B. to the said E. F. on the day of ; And so as the award be made in writing, under the hands of the arbitrators, or any two of them, and ready to be delivered to the parties, or if they or any of them shall be dead before the award shall have been made, to their respective executors or administrators, or such of them respectively as shall desire the same, on or before the day of next.

Arbitrators may examine parties, &c., on oath; and call for books and papers.

5. The arbitrators, or any two of them, shall have power to examine the parties, and their witnesses, on oath or affirmation, and call for books and papers in the possession or power of either of the parties, which are to be produced on oath or affirmation.

Each party may inspect books, &c.

6. Each of the parties shall in the meantime be at liberty to inspect, peruse, and have copies of all or any of the books, papers, and writings in the hands, custody, or power of the other or others of them the parties respectively, relating to the matters in reference.

Power for arbitrators to proceed *ex parte*, after notice.

7. If either party shall, in the opinion of the arbitrators, or any two of them, without sufficient cause, by non-attendance or non-production of books, papers, or writings, or otherwise delay or impede, or attempt to delay or impede, the progress of the arbitrators, in making their award, the arbitrators, or any two of them, shall be at liberty to proceed *ex parte*, after two days' clear notice to the party or parties causing such delay or impediment as aforesaid, to be left at his or their dwelling-house or place of business.

Arbitrators may employ an accountant.

8. The arbitrators, or any two of them, if they shall think it necessary, shall be at liberty to appoint an accountant to their assistance; the expense of such accountant to be paid, one-half by the said E. F., and the other half by the said A. B. and C. D.; such accountant to be required to make his solemn declaration, according to the statute, of the truth of the account or statement to be made out by him.

Stay of proceedings.

9. All proceedings in the said actions shall be stayed until the day of next, when, if no award shall be made, or the time for making the same shall not be enlarged by consent, each of the parties shall be at liberty to proceed as they or either of them shall be advised.

Death of parties not to affect the reference.

10. The submission hereby made shall not be defeated or affected by the death of the parties, or any of them, pending the same; but shall be proceeded with, and the matters in difference determined in the same manner as if the award of the arbitrators had been made and delivered in the lifetime of the party or parties so dying; and the executor or administrator, executors or administrators, of the party or parties so dying shall be, and be deemed and considered to be, to all intents and purposes, a party or parties to the reference or submission hereby made.

Expenses of arbitration.

11. The expenses of the arbitration and award shall be paid, one-half by the said E. F., and the other half by the said A. B. and C. D.[1]

Submission to be made rule of Court.

12. This submission shall be made a rule of the Queen's Bench Division of Her Majesty's High Court of Justice. IN WITNESS, &c.

III. *SUBMISSION BY BOND from One to One in the Common Form.*

Common obligation from one to one.

KNOW ALL MEN that I [*obligor*], of &c., am bound to [*obligee*] of &c., in the sum of [*penalty*], to be paid to the said [*obligee*] or to his attorney, executors, administrators or assigns. For which payment I bind myself by these presents. Sealed with my seal. Dated this day of , 19 .

A general condition of a common arbitration bond.

THE CONDITION of the above-written bond is such that if the said [*obligor*], his heirs, executors and administrators, shall in all things well and truly obey, abide by, and perform the award and final determination of [*arbitrators*], of &c.,[2] arbitrators named as well on behalf of the above-bounden [*obligor*], as of the above-named [*obligee*], to award and determine concerning all actions, causes of action, claims and demands whatsoever, which at any time or times heretofore have been had, brought, commenced, done, suffered or depending by and between the parties; so as the said award be

[1] For clause giving the arbitrators power over costs, of and incident to the submission, arbitration and award, see *ante*, p 466.

[2] If there be three arbitrators, which it is sometimes thought advisable to appoint in the first instance, as it prevents the necessity of having an umpire, say, "or any two of them."

made in writing, under the hands of the arbitrators,[1] and ready to be delivered to the parties, or if they or either of them shall be dead before the award shall have been made to their respective executors or administrators, who shall desire the same, on or before the day of next,[2] then the above-written bond shall be void and of no effect. And the parties hereby agree that this submission shall or may be made a rule of the Queen's Bench Division of Her Majesty's High Court of Justice at the instance of either of the parties, his executors or administrators. And that the arbitrators [and umpire] shall, for the purpose of enabling them [or him] to make the award [or umpirage], be at liberty to go into parol as well as written evidence; and to examine the parties or either [or any or one] of them, and such other witnesses as they or he shall think proper, on oath.

Rule of Court.

Arbitrators to receive parol or written evidence, and examine on oath.

Signed, sealed and delivered in the presence of }

IV. *SUBMISSION BY BOND from One to Two jointly and severally to abide by the Award of Three Arbitrators, or any Two of them, or of their Umpire.*

Obligation, one to two jointly and severally.

KNOW ALL MEN BY THESE PRESENTS, that I [*obligor*], of &c., am bound to [*obligee*], of &c., and [*other obligee*], of &c., jointly and severally in the sum of [*penalty*], to be paid to the said [*obligee*] and [*other obligee*], or either of them, or the attorney, executors, administrators or assigns, of them or either of them: For which payment to be well and truly made, I bind myself by these presents. Sealed with my seal. Dated, &c.

Condition of arbitration bond to abide by award of three arbitrators, or any two of them;

THE CONDITION of the above-written bond or obligation is such, that if the above-bounden [*obligor*], his heirs, executors and administrators, shall in all things well and truly obey, abide by, and perform the award and determination of [*three arbitrators*], of &c., arbitrators named, on the parts of the said [*obligor*] and the said

[1] "Or any two of them."

[2] If the arbitrators are to extend the time, say,

Enlarged time.

"or, on or before such other day, not beyond the day of , as the arbitrators [or any two of them] shall, by writing under their hands, from time to time appoint."

Umpire.

If there be only two, or an equal number of arbitrators appointed, and on their disagreement an umpire is to be appointed, say,

"And in case the arbitrators should not make such their award of and concerning the premises within the time limited as aforesaid, if the above-bounden [*obligor*], his heirs, executors and administrators, on his and their part and behalf, should in all things well and truly obey, abide by and perform the award and final determination of [*umpire*], of &c., being the umpire named and chosen by the parties [*or*, "of such third person as the arbitrators shall in writing nominate and appoint as umpire] in and concerning the premises: *So as* the umpire do make and set down his award and umpirage in writing, and ready to be delivered to the parties or their respective executors or administrators who shall desire the same, on or before the day of next,—Then," &c.

And insert in the last clause the words in brackets, which will be omitted if no umpire is to be appointed.

[*obligees*], to arbitrate, award and determine of and concerning all and all manner of actions, causes of action, quarrels, controversies, trespasses, damages and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending, by or between the said [*obligor*] and the said [*obligees*], or either of them, or of such two of the said arbitrators as shall consent to accept and take upon themselves the making of such award (in case any of them should refuse or decline to make the same); so as the said award be made by the said [*three arbitrators*], or such two of them as shall so agree to make the same as aforesaid, on or before the day of , now next ensuing; but in case the said arbitrators, or some two of them (if they should all take upon themselves the making of the said award), should not agree in their award, then, if the above-bounden [*obligor*], his heirs, executors and administrators, shall in all things well and truly obey, abide by and perform the award and determination of such person as shall be nominated and chosen by the said [*arbitrators*], or by such two of them as shall consent and agree to take upon themselves the said arbitration between the parties, of and concerning the premises; so as such umpire, so to be chosen as aforesaid, do make his award and determination of and concerning the premises, on or before the day of next, the above-written bond shall be void and of no effect; AND the said [*obligor and obligees*] hereby agree that this submission shall be made a rule of the Queen's Bench Division of Her Majesty's High Court of Justice; And that this submission shall not be revoked by the death of the said [*obligor*] and the said [*obligees*], or either of them, before the making of the said award.

or of their umpire.

IN WITNESS, &c.

V. *COVENANT by* EXECUTORS AND LEGATEES *to abide by the Award of an Arbitrator respecting the* ESTATE *and* EFFECTS OF A TESTATOR, *and other Matters.*

Parties. THIS INDENTURE, made &c., BETWEEN E. G., of &c., and J. A., of &c., executors of the last will and testament of [*testator*], late of &c., deceased, of the first part; P. M. G., one of the grandchildren of the said [*testator*], deceased, by his daughter, late the wife of the said E. G., now also deceased, of the second part; the said P. M. G., E. A., wife of the said J. A., and only surviving daughter of the said [*testator*], deceased, J. B., of &c., husband of L. G., granddaughter of the said [*testator*], deceased, E. G. the younger, of &c., Jos. G., of &c., John G., of &c., P. A., of &c., and S. A., of &c., all grandchildren of the said [*testator*], deceased, of the third part: WHEREAS differences have arisen between the said E. G. the elder and J. A., as such executors as aforesaid, and the said P. M. G., and also between the said executors and the said E. A., the said P. M. G., the said J. B., the said E. G. the younger, the said Jos. G., the said John G., the said P. A., and S.A., in their

Recital of disputes.

respective rights and qualities above mentioned, touching the estate and effects of the said [*testator*], deceased; and also touching several other matters and things: And in order to put an end to the said differences, the said parties have agreed to refer the same to the award and determination of X. Y., of &c., barrister-at-law. NOW

Testatum. THIS INDENTURE WITNESSETH, that they the said parties hereto do, and each of them doth, severally and respectively covenant and agree with each other to observe and perform the award and determination of the said [*arbitrator*], of and concerning the premises aforesaid, or anything in anywise relating thereto; And also of and concerning all actions, causes of action, accounts, sums of money, damages and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, committed, or depending by or between the said parties, or any of them; So as the said award of the said arbitrator may be made in writing. AND IT IS ALSO AGREED, that [*add any provisions thought advisable, as to which see preceding Precedents*].

IN WITNESS, &c.

VI. *APPOINTMENT of an* ARBITRATOR *in pursuance of an Arbitration Clause in* ARTICLES *of* PARTNERSHIP.

MEMORANDUM.

Recital of articles of partnership, WHEREAS by articles of partnership, dated &c., and made &c., amongst other things, IT WAS AGREED, that in case any dispute or question should arise between the said parties relative to the construction of the said articles, or to all or any of the matters or things therein contained, the same should be referred to the arbitration of two indifferent persons, one to be named by each of the parties, with power for such arbitrators to appoint an umpire in case of their disagreement: And that the award of the said arbitrators or umpire should be final and conclusive: AND WHEREAS

that disputes have arisen. disputes have arisen between the said parties relating to their partnership (and also relating to several other matters and things), and they have in pursuance of the said covenant agreed to refer

Appointment of arbitrator. the same accordingly. NOW, THEREFORE, I [*partner*] hereby nominate and appoint [*arbitrator*], of &c., an arbitrator for me and on my behalf, to hear and determine the disputes aforesaid, in accordance with the provisions of the said articles of partnership.

Dated the day of , 19 .

Witness, A. B. [*Signature.*]

VII. *APPOINTMENT by* ARBITRATOR *of* TIME *and* PLACE *of* MEETING.

IN THE MATTER OF, &c.

Appointment of meeting. I APPOINT Monday, the day of next, for proceeding in the above reference, at the hour of in the

Notice to proceed *ex parte*.

forenoon, at ; And I hereby give notice that if either party shall fail to appear before me without having previously given me good and sufficient reason for such default, I shall, at the request of the other party, if present, proceed with the reference *ex parte*.

Dated the day of , 18 .

To [*parties*]. [*Arbitrator's signature*].

VIII. *NOTICE to Produce* DOCUMENTS *by a* SOLICITOR *of One of the Parties in an Arbitration.*

IN THE MATTER of the arbitration between A. B. and C. D.

To Messrs. and , Solicitors.

THIS IS TO GIVE YOU NOTICE to produce before [*arbitrator*] and [*arbitrator*], the arbitrators to whom all matters in difference between the above-named parties have been referred, to-morrow at o'clock, at the Hotel, Street, all books, deeds, writings, vouchers and other documents whatsoever relating to the matters in difference between the said parties so referred as aforesaid, now in your possession, custody or control, and particularly a certain indenture dated, &c., and made between, &c. [*describe the instrument*]. Dated the day of .

E. F.

Solicitor for A. B., Esquire.

IX. *NOTICE to Produce* DOCUMENTS *by an* ARBITRATOR.

IN THE MATTER of the arbitration between A. B. and the Railway Company.

To A. B., Esquire.

PURSUANT to the powers given to me by the Lands Clauses Consolidation Act, 1845,[1] and of every other power me hereunto enabling, I HEREBY REQUIRE you to produce before me on next, at my office, Street, Westminster, the several books of account, deeds, writings and other documents, specified in the schedule hereto annexed, and all other documents relating to the matters referred to me in the above-mentioned arbitration. Dated the day of , 18 .

C. D.

Arbitrator.

THE SCHEDULE ABOVE REFERRED TO.

X. *NOTICE by* ARBITRATORS *to* UMPIRE *of Disagreement.*

IN THE MATTER of the arbitration between A. B. and C. D.

To , Esquire, Umpire.

THIS IS TO GIVE YOU NOTICE that we are unable to agree with regard to the matters referred to us in the above-

[1] Or otherwise state the submission.

mentioned arbitration, and that there is no probability of our making any award, and that you are at liberty to proceed as umpire forthwith, to investigate and decide on the said matters. Dated the day of , 19 .

E. F. }
G. H. } Arbitrators.

XI. *ENLARGEMENT of the Time for making an Award by the* PARTIES *in Difference.* (*Endorsed.*)

KNOW ALL MEN BY THESE PRESENTS, That WE, the within-named [*parties*], do hereby give and allow unto the within-named [*arbitrators*] further time for making their award of and concerning the several matters within referred to them, until the day of now next ensuing; And we do hereby declare and agree, that the provisions mentioned in the within-written agreement of reference by us touching the matters in difference shall be and shall continue in full force during the enlarged time hereby given for making the same award, as fully and effectually in all respects as if the said enlarged time had been mentioned in the said agreement, instead of the time thereby limited. IN WITNESS, &c.

XII. *ENLARGEMENT of the Time for making an Award by the* ARBITRATORS.

IN THE MATTER of the arbitration between A. B. and C. D.

WE, the undersigned, by virtue of the power given to us by an agreement dated, &c., whereby the matters in difference between the above-named parties were submitted for arbitration, do hereby enlarge [*or* further enlarge] the time for making our award, respecting the said matters, until the day of next, on or before which day our award shall be made and published. As WITNESS our hands this day of 19 .

E. F. }
G. H. } Arbitrators.

XIII. *REVOCATION of* SUBMISSION *by a Party.*

Revocation of submission.

KNOW ALL MEN BY THESE PRESENTS, that I [*party*], of , in the county of , do hereby revoke, annul, and make void all the powers and authority which by a memorandum of agreement, dated the day of 19 , and expressed to be made between [*parties*], were given to [*arbitrator*], of &c., and [*arbitrator*], of &c., the arbitrators thereby nominated and appointed to investigate, award, and determine all matters in difference between me and [*other party*], of &c., con-

Discharge of arbitrators.

cerning the dealings and transactions in the said memorandum of agreement mentioned: AND I do further hereby discharge and prohibit the said [*arbitrator*] and [*arbitrator*], or either of them, from making any award, or further proceeding in the matter of the said arbitration. As WITNESS my hand [and seal] this day of , 19 .

Witness, C. D. A. B.

XIV. *APPOINTMENT of a* JOINT ARBITRATOR, *by Two Arbitrators.* (*By Endorsement.*)

WE [*arbitrators*], the arbitrators within named, by this memorandum in writing under our hands, made before entering upon the within-mentioned arbitration, do hereby nominate and appoint [*third arbitrator*], of &c., the third arbitrator, to whom, together with ourselves, the within-mentioned matters shall be referred, according to the tenor and effect of the within rule (*or* within-written bond or obligation, *or* indenture), On condition that he do, within days from the date hereof, in writing, consent to act therein accordingly. IN WITNESS, &c.

XV. *APPOINTMENT of an* UMPIRE *by Arbitrators.* (*By Endorsement.*)

WE, the within-named [*arbitrators*], do hereby nominate and appoint [*umpire*], of &c., to be the umpire[1] in the matters within referred, On condition that he do, within days from the date hereof, in writing, accept the umpirage.[2] As WITNESS our hands, &c.

XVI. *APPOINTMENT of an* UMPIRE *by Arbitrators.* (*Not Endorsed.*)

WE, the undersigned arbitrators, by virtue of the powers to us given by an agreement of reference made on the day of , 19 , between, &c., [*or*, by an order of *Nisi Prius* made on the day of , 19 , in an action in which A. B., of &c., was plaintiff, and C. D., of &c., was defendant, *or* by the Agricultural Holdings Act, 1883, *or as the case may require*], do hereby nominate and appoint [*umpire*], of &c., to be the umpire, according to the provisions of the said agreement of reference [*or* order, *or* act], On condition, &c. (*see last Precedent*). As WITNESS our hands, &c.

Third arbitrator.

[1] If it be to assist the arbitrators (see *Still* v. *Halford*, 4 Camp. 17), say, "To assist us in," &c.

[2] If the consent of the parties be requisite, add, "*And* we the said [*parties*] do hereby consent thereunto."

XVII. *AFFIDAVIT of the* DUE EXECUTION *of the* SUBMISSION, *in order to its being made a* RULE OF COURT.

IN THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION.

Affidavit of execution of bond.

I, A. B., of &c., make oath and say: On the day of , I was present at and did then see the execution of the bond or obligation hereunto annexed: And [*obligor*], of &c., Esquire, therein mentioned, did then duly sign, seal, and as his act and deed deliver the said bond or obligation in the presence of me, this deponent: And the name [*obligor*], set and subscribed to the said bond or obligation, is of the proper handwriting of the said [*obligor*]: And that the name A. B., set and subscribed as the witness thereto, is of the proper handwriting of me, this deponent.

SWORN, &c. [Witness.]

XVIII. *AWARD of one Arbitrator for Payment of a* SUM OF MONEY; *and for* MUTUAL RELEASES.

Recital of differences and submission;

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of &c., send greeting. WHEREAS divers differences and disputes having arisen between A. B., of &c., and C. D., of &c., the said A. B. and C. D., by an agreement dated &c., and made &c., agreed to refer the same to the award and determination of me the said [*arbitrator*]; and did accordingly, by their several obligations, bearing date on or about the day of respectively, become bound each to the other in the penal sum of £ ;

of bonds, with conditions for performance of award.

With conditions thereunder written, to obey and perform my award concerning all the matters in difference; so as the said award should be made in writing and ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the day of then next.

Award

NOW KNOW YE that I, the said [*arbitrator*], having taken upon me the said award and arbitrament, and having been attended by the said parties and their respective solicitors, and having heard and considered the allegations and evidence of both the said parties and their witnesses concerning the premises, do hereby award as follows, that is to say:

of sum of money;

1. I award and determine that the said C. D. shall pay to the said A. B. on the day of next ensuing, the sum of £ .

and that each of the parties shall give to the other a general release.

2. I further award and determine that upon payment of the said sum of £ to the said A. B. as aforesaid, they the said A. B. and C. D. shall respectively, at the cost of the party requiring the same, make and execute each unto the other of them releases in writing of all actions, causes of action, debts, controversies, claims, and demands whatsoever, up to the day of the date of the aforesaid obligations.

Costs.

3. I further award that the costs of the reference, including the costs of the preparation and execution of the said agreement of reference and of this award shall be borne and paid as to one moiety thereof by the said A. B., and as to the other moiety by the said C. D. [*or otherwise as the arbitrator may direct*].

IN WITNESS whereof I, the said [*arbitrator*], the arbitrator aforesaid, have hereunto set my hand the day of , 19 .

Signed and published in the presence of us }

XIX. *AWARD that a* PARTNERSHIP *be* DISSOLVED, *with consequent Directions.*

Recital of disputes,

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*], of &c., send greeting. WHEREAS divers disputes and differences have arisen between A. B. and C. D. with reference to the business carried on by them in partnership under the style or firm of B. & Co., and with reference to their respective rights and liabilities under their articles of partnership, dated &c.

—and submission to arbitration.

AND WHEREAS by an agreement dated &c., and made &c., the said A. B. and C. D. agreed to refer all such disputes and differences to me as arbitrator, with power among other things to award that the said partnership should stand dissolved as from any day in the year 19 which I might fix by my award.

Award

NOW KNOW YE, that I, the said [*arbitrator*], having &c., do make this my award of and concerning the matters so referred to me as aforesaid, in manner following, that is to say:

that partnership be dissolved:

1. The said partnership shall be deemed to have been determined on, and shall stand dissolved from the day of .

that A. B. shall receive all the partnership debts; and may use C. D.'s name in any action or suit for recovery thereof:

2. The said A. B., his executors or administrators, shall and may have, and receive to his or their own use, without the interference of the said C. D., all debts due and owing to the said partnership, from any person whomsoever: And may use the name of the said C. D. in any action or proceeding to be commenced for the recovery of any such debt or demand.

that A. B. shall pay all demands on the co-partnership; and indemnify C. D. therefrom: and from all damages by reason of his name being used:

3. The said A. B. shall pay and discharge all debts, demands, and claims whatsoever, due by, or which may be made against the said partnership, or the said C. D. in respect thereof: And shall indemnify the said C. D. from all such debts, demands and claims, and from any loss or damage that may be incurred or sustained by the said C. D., by reason of his name being used in any such action or proceeding as aforesaid.

4. The said C. D. shall, upon the request of the said A. B., his executors or administrators, deliver up to him or them all and every the books, papers, and writings, which may be in the custody,

power, or possession of him the said C. D., in anywise relating to the business of the said partnership.

that A. B. shall, at a fixed time and place, pay a sum of money to C. D.

5. The said A. B. shall on the day of next, at the house of the said C. D., at aforesaid, pay to the said C. D. the sum of £ . And the said C. D. shall accept the same sum in full satisfaction and discharge of all demands against the said A. B., until the day of the date of the said submission.

Costs.

6. I further award that the costs of this reference (*ante*, p. 476).

IN WITNESS, &c.

XX. *AWARD by Arbitrator respecting the* ESTATE AND EFFECTS OF A TESTATOR, *on a Submission by the* EXECUTORS, *and the* PERSONS INTERESTED, *as to* TESTATOR'S INTENTION, LEGATEES' CLAIMS, *and* PARTNERSHIP ACCOUNTS.[1]

Recital of deed of submission.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*], of &c., send greeting. WHEREAS in and by an indenture, bearing date &c., and made &c. (*recite terms of submission, ante*, p. 470).

Testatum.

NOW KNOW YE, that I, the said [*arbitrator*], having taken upon myself the charge of the said award, and having heard and considered the several allegations, vouchers and proofs brought before me by and on behalf of the said parties respectively, am of opinion,

That the testator's intention was, to give, devise, and bequeath to several persons, certain legacies and property.

That the intention of the said [*testator*], deceased, was, by will, to give, devise and bequeath the following legacies and property; namely, unto his widow, E. M., the interest or dividends arising from £ , three per centum consolidated bank annuities; and the use of the household furniture, plate and utensils in and appertaining to the testator's house at (valued at £), during her life; And from and after her decease, the said annuities, household furniture, plate and utensils to be the property of and divided amongst his seven grandchildren, the above-named P. M. G., &c., by even and equal portions: Unto the said P. M. G., &c., all the interest or concern of the said [*testator*], deceased, in shipping, and the benefit to arise therefrom, share and share alike: Unto the said P. M. G. in fee-simple the house then occupied by his father, the said E. G. the elder: Unto the said L. B. in fee-simple the house then occupied by Mrs. X.: And unto the said E. G. the younger in fee-simple the house then occupied by Mr. Y.; all which houses are situate in or near Street, in the said parish of : Unto the said seven grandchildren the following specific legacies, or sums of money: that is to say: To the said P. M. G. and L. B. the sum of £ each; to the said E. G. the younger, Jos. G., John G., P. A. and S. A., £ each; And to his daughter the said E. A., the sum of £ ; and also in fee-simple the house and land situate in aforesaid, then and now in the occupation

[1] For the submission above referred to see Precedent V., *ante*, p. 470.

of the said J. A.; together with his coach and horses. THEREFORE, we hereby appropriate and fix the aforesaid devises, legacies and bequests given and bequeathed, or intended to be given or bequeathed, to the said E. M., P. M. G., L. B., E. G. the younger, Jos. G., John G., P. A., S. A., and E. A. respectively, in and by the will of the said P. M., deceased, in manner above mentioned. AND we award and confirm the same to the said devisees and legatees, their heirs, executors, administrators, and assigns respectively. AND we order and direct the said several devisees and legatees, and all and every person or persons claiming for, by, or from or under them, or any of them, to be and remain fully satisfied and contented with the sums and proportions of the estate, goods, chattels, and credits of the said [*testator*], deceased, hereinbefore specified, so far as relates thereto, or to any part thereof. AND we order and direct, that the said E. G., the elder, and J. A., as executors as aforesaid, shall pay to the said P. M. G., the sum of £ , in full of all claims and demands the said P. M. G., or his representatives, can or may have on the estate of the said [*testator*], deceased, for the balance of account due to him as partner with the said late [*testator*] at the time of his decease: AND we direct the said P. M. G. to receive the said sum accordingly: AND we further award and order, that one moiety of the book debts due and owing to the said [*testator*], deceased, and the said P. M. G., as partners in trade, and which have been taken by the said P. M. G., at and for the sum of £ , shall be the property of the said P. M. G.; and that the remaining moiety thereof shall be the property of and divided among the said seven grandchildren of the said [*testator*], deceased: We also award unto the said E. A. all the household furniture and utensils that were in the house now occupied by the said J. A. at the decease of the said [*testator*], together with every article then in, upon, or in any wise belonging or appertaining to the said house and premises: AND we further award and order, that all the rest, residue, and remainder of the estate, goods, chattels, and credits of the said [*testator*], deceased, shall be divided among his said seven grandchildren, the said P. M. G., &c. equally: AND we likewise award and direct that the said E. G., the elder, and J. A., as executors as aforesaid, shall pay to the said P. M. G. one moiety of the said book debts; and to each of them the said P. M. G., &c., an equal portion of the other moiety of the said book debts; and also their respective proportion, or such part thereof as has not been already paid, of the interest or concern in shipping of the said [*testator*], deceased, pursuant to an agreement entered into between the said E. G., the elder, and J. A., his executors as aforesaid, and the said P. M. G., amounting, as appears by the said agreement, to the sum of £ ; AND we direct that the said agreement shall be finally confirmed; and also of such other part of the said shipping, or interest therein, of the said deceased, as has not been included in the said agreement; and likewise of the rest, residue,

Award of legacies and property accordingly; and

that the legatees and devisees shall remain satisfied therewith;

that the executors shall pay P. M. G. a sum in full of all demands;

that one-half of book debts owing to testator and P. M. G., as partners, belongs to P. M. G.,

and other half to testator's seven grandchildren;

that all the furniture in a house at testator's death belongs to E. A.;

and that the residue of testator's estates shall be equally divided amongst P. M. G. and the testator's other grandchildren:

that the executors shall pay P. M. G., one-half of the book debts, and to the grandchildren the other half equally;

and their unpaid proportion of the shipping concern pursuant to an agreement;

and also of such other part of shipping concern as is not included in agreement; and of the residue of testator's estate, when received, to the amount of £ : that devisees and legatees shall execute releases; that the executors shall pay expenses of reference; and that, on performance of award, all differences shall cease.

and remainder of his estate, goods, chattels, and credits, not otherwise disposed of in or by his last will and testament, as the same shall be from time to time collected, gotten in, and received by the said executors, to the amount of £ , or upwards: AND we direct the said devisees and legatees respectively, and every other person claiming, or to claim, by, from, or under them, or any of them, from time to time, when lawfully required, to sign, seal, execute, and deliver good and sufficient releases, acquittances, and discharges for all moneys paid or to be paid to them, by the said executors, by virtue of the said will, and of these presents: AND we moreover award that the said E. G., the elder, and J. A., as executors as aforesaid, shall pay into the hands of Messrs. , the sum of £ , at or before the delivery of this our award, for charges of the present reference: AND upon performance of this our award, all differences and disputes in anywise subsisting between the said parties, or any of them, previous to the day of the date of the said indenture, touching the premises, shall cease and determine. IN WITNESS, &c.

XXI. *AWARD that a Sum is due to a* SOLICITOR; *that he has a* LIEN *upon the Client's Papers for it, &c.*

[*After formal parts and recitals, continue:*]

Award that a sum is due to a solicitor; that he has a lien upon the client's papers for the sum; that the sum be paid, and accepted in full of all demands for business referred.

NOW KNOW YE, that I, the said [*arbitrator*], having taken, &c., hereby award and adjudge that, at the date of the said submission, there was, and now is, due and owing to the said A. B. by the said C. D., for and upon the several matters referred to me as aforesaid, the sum of £ , and no more; AND I further award, that the said A. B. has a lien upon all deeds, papers, and writings in the custody or possession of him the said A. B., belonging or relating to the affairs of the said C. D. for the payment of the said sum of £ : (*Add award and order that C. D. pay, on &c., at &c., the said sum of &c., ut ante*, p. 477.) AND I do further award and order, that the said A. B. shall receive from the said C. D. the said sum of £ , and shall accept the same in full satisfaction of all demands for such business done and money due, paid, laid out, and expended, as is hereinbefore mentioned. IN WITNESS, &c.

XXII. *AWARD of a* SUM *to be taken in full* SATISFACTION *of all* CLAIMS, *and for Execution of a* GENERAL RELEASE.

[*After formal parts and recitals, including recitals of an Action and of an Order of Reference, continue:*]

Award that a certain sum be paid; and received in full satisfaction of matters referred;

NOW KNOW YE, that I the said [*arbitrator*], having, &c., hereby award, and adjudge, that the said C. D. shall pay to the said A. B., on the day of , at &c., the sum of £ : AND that the same shall be received by the said A. B. in full satisfaction and discharge of and for all the matters in difference to me referred as aforesaid: AND that upon payment

thereof, the said A. B. shall, if required so to do, by and at the costs of the said C. D., execute and deliver to him the said C. D., a general release in writing, of all and all manner of action and actions, cause and causes of action, debts, duties, claims, and demands whatsoever, in anywise subsisting or depending between the said A. B. and C. D. previous to the day of the date of the aforesaid order: AND I do further award and order that each of the said parties shall and do bear and pay his own costs of the said action and of this reference: AND that the costs of this my award be paid in equal moieties between them.

that each party pay his own costs of action and reference; and that the costs of award be paid equally.

IN WITNESS, &c.

XXIII. *AWARD of Two Arbitrators (the third dissenting) under an Arbitration* CLAUSE IN A SHIPBUILDING CONTRACT, *and* UNDER AN ORDER OF COURT *in an Action for* NON-DELIVERY OF A SHIP.

TO ALL TO WHOM THESE PRESENTS SHALL COME. We, G. H., of &c., and J. K., of &c., send greetings. WHEREAS by an agreement, dated the day of , and made between A. B. & Co., of &c., of the one part; and C. D., of &c., of the other part; The said A. B. & Co. agreed to build for the said C. D. two vessels and engines as therein mentioned, which should be ready for delivery afloat by the day of , 19 , for the price of £ , to be paid by certain instalments, as therein provided: AND WHEREAS the said agreement, amongst other things, provided that any dispute arising between the parties during or after the construction of the vessels, engines, boilers and machinery should be referred to the arbitration of two persons, to be appointed by the parties respectively, and of one other person, to be appointed by the two so appointed, the decision of any two to be binding; and that all the provisions of the Common Law Procedure Act, 1854, relating to arbitrations, should apply to the said agreement; and that the costs of such reference, and of the arbitrators and award, should be in the discretion of the arbitrators, or any two of them; and that the arbitrators, or any two of them, should be at liberty to make one final award, or one or more interim awards, until a final award should be made, and to make their award at any time without reference to time; and it was thereby also provided that the submission thereby made might be made a rule of any of Her Majesty's Courts of Record: AND WHEREAS the said C. D. on the day of , 19 , commenced an action in the Queen's Bench Division of Her Majesty's High Court of Justice against the said A. B. & Co., in which the said C. D. claimed the delivery of the (being one of the two vessels contracted for as aforesaid, the other vessel having been delivered and paid for), and also claimed damages for breach of the said agreement: AND WHEREAS the statement of claim in the said action was delivered

Recital of agreement to build ship;

of arbitration clause;

of commencement of action;

of delivery of statement of claim;

of order for reference of matters in dispute;

on the day of , 19 : AND WHEREAS, on the day of , 19 , upon the hearing of a summons issued by the said C. D., calling upon the said A. B. & Co. to show cause why the said A. B. & Co. should not (upon certain terms therein mentioned) deliver to the said C. D. the said vessel, it was by and with the consent of the said parties and their respective counsel and solicitors, ordered that, upon payment of £ by the said C. D. to the said A. B. & Co., the said vessel should be delivered by the said A. B. & Co. to the said C. D. on or before the day of , 19 , the said C. D. taking such vessel as she was, and making no claim for damages except for delay, and that the damages for delay should be referred under the contract, the said A. B. & Co. to be at liberty, if they should think fit, to put forward on the arbitration any claim they might think proper for extras beyond the £ , the said C. D. denying that there was any such claim, the arbitrators to decide whether there was or not, and that the costs of the said action should be in the discretion of the arbitrators. AND WHEREAS the said C. D. has paid the said sum of £ to the said A. B. & Co., and has obtained possession of the said vessel: AND WHEREAS by an agreement made the day of , 19 , between the said A. B. & Co., of the one part, and the said C. D., of the other part, it was agreed by and between the said parties, for the purpose of carrying out the aforesaid terms of reference, that the claim of the said C. D. for damages for the delay on the part of the said A. B. & Co. (which they did not admit) should be referred to the arbitration and award of E. F., of &c., as arbitrator on the part of the said A. B. & Co., and of G. H. as arbitrator on the part of the said C. D. and a third arbitrator, to be appointed by the said two arbitrators, with the liberty to the said A. B. & Co. which was given to them by the said order of the day of , 19 , to put forward, if they should think fit, on the arbitration, any claim they might think they had for extras beyond the £ , the said C. D. denying that there was any such claim, and the arbitrators to decide whether there was or not; and that the decision of any two of the arbitrators should be binding, and that the said arbitration should proceed as provided by the said clause of the contract, and that the costs of the said action, as well as of the reference and of the arbitrators, and award should be in the discretion of the arbitrators, or any two of them; and that nothing in the agreement now in recital should prejudice or affect the said order of the day of , 19 , and that the said submission might be made a rule of the King's Bench Division of His Majesty's High Court of Justice; AND WHEREAS the said E. F., as arbitrator on the part of the said A. B. & Co., and the said G. H., as arbitrator on the part of the said C. D., failed to agree upon, and did not appoint, a third arbitrator, in pursuance of the said agreement of the day of , 19 : AND WHEREAS the said C. D., in accordance with the provisions of the Common

of delivery of ship;

of agreement for conduct of the reference;

that arbitrators appointed failed to appoint a third arbitrator;

of service of notice on them to make such appointment.

Law Procedure Act, 1854, served, on the day of , 19 , the said E. F. and G. H. with a notice in writing whereby they were thereby required to appoint, in pursuance of the said agreement of the day of , 19 , the third arbitrator to the said arbitration and award, and that unless within days after the service of the notice they should appoint such third arbitrator, proceedings would be taken for procuring the appointment of the said third arbitrator by a judge, as by the Common Law Procedure Act, 1854, is prescribed in that behalf: AND WHEREAS, on the day of , 19 , upon the hearing of a summons taken out by the said C. D., after the expiration of clear days from the service of the above notice, no such third arbitrator having been appointed by the said A. B. & Co., as therein required, it was ordered by the Court that, pursuant to the said submission of the day of , 19 , and pursuant to the Common Law Procedure Act, 1854, J. K. should be appointed the third arbitrator in the said reference: AND WHEREAS the said E. F. does not agree with the conclusions arrived at by the said G. H. and J. K. NOW WE, the said G. H. and J. K., having taken upon ourselves the burthen of this reference, and having duly weighed and considered the several allegations of the said parties, and also the proofs, vouchers, and documents, which have been given in evidence before us, do hereby make and publish our award in writing of and concerning the matters referred to us in manner following, that is to say:

of order appointing third arbitrator;

that one of the arbitrators dissents from conclusion of the other two.

Award:

as to claim for damages;

1. We award and adjudge that the said C. D., the plaintiff, is not entitled to recover any damages from the said A. B. & Co., the defendants, in respect of the claim for delay on the part of the said defendants, and that the defendants are not entitled to recover anything from the plaintiffs in respect of their claim for extras.

as to costs.

2. We do also further award and direct that the defendants do pay to the plaintiffs the costs of the proceedings to obtain delivery of the said vessel, and that each party do bear his own costs of the reference, and pay half the costs of the award.

IN WITNESS, &c.

XXIV. *AWARD under Rule of Court for* STAY OF PROCEEDINGS, PAYMENT OF MONEY, *and Collection of* PARTNERSHIP *Debts.*

[*After formal parts and recitals, continue:*]

Testatum.

NOW KNOW YE that we, the said arbitrators, having taken upon ourselves the burthen of the said reference, and having examined and duly considered the allegations, vouchers, proofs, and witnesses of the said parties respectively, make and publish this our award in writing of and concerning the matters to us referred, as follows: that is to say; WE award and direct, that all proceedings in the said action shall cease, and be no further prosecuted: AND that the said [*defendant*] shall pay to the said

Award that proceedings in the action shall cease;

that defendant shall pay plaintiff a certain sum:

[*plaintiff*], on the day of next, the sum of £ , which sum we adjudge and declare to be due from the said [*defendant*] to the said [*plaintiff*], for and in respect of the matters contained in the declaration in the said action: AND we do further award and direct that the said [*defendant*] shall permit and suffer the said [*plaintiff*] to collect and receive, for their joint use, the several debts and sums of money following; that is to say (*state the names of the debtors, and the amount of their respective debts*): AND we do further award and direct that the said [*plaintiff*] shall use his utmost endeavours to collect and receive the said several debts and sums of money accordingly: AND that the said [*plaintiff*] shall be at liberty to bring any action or actions, either in his own name, or in the name of the said [*defendant*], or in their joint names, as he may be advised, for the recovery of any debt or debts, sum or sums of money, hereinbefore mentioned; But nevertheless, if the said [*plaintiff*] should bring any action in the name of the said [*defendant*], without his consent for that purpose first had and obtained, that then the said [*plaintiff*] shall indemnify the said [*defendant*] from all consequences, costs, charges, and expenses attending any such action: AND we further award and direct that the said [*plaintiff*] shall not compound or compromise any action to be brought for the recovery of any of the said debts or sums of money, without the consent of the said [*defendant*], in writing, for that purpose first had and obtained: AND that the said [*plaintiff*] shall, within one month after payment of the said sum of £ , deliver to the said [*defendant*] an account of the place of residence of all persons indebted to them, the said [*plaintiff*] and [*defendant*], so far as the said [*plaintiff*] shall know, or be able to ascertain the same: AND shall give to the said [*defendant*] an account of his proceedings, from time to time, within six weeks after any request in writing so to do: AND shall also, from time to time, as the same debts are respectively received, pay to the said [*defendant*], one moiety thereof (all reasonable expenses touching the collecting and recovering of such debts being first deducted): AND LASTLY, we do award and direct that each of the said parties shall and do bear his own costs of the said action and [*as to costs*]. IN WITNESS, &c.

that plaintiff collect debts;

that the plaintiff may bring actions in the name of defendant,

indemnifying defendant from costs;

plaintiff not to compromise any action without defendant's consent;

plaintiff to deliver an account of the residences of all persons indebted;

and give defendant an account of his proceedings;

and as debts are received, pay defendant a moiety;

award as to costs of action and of reference.

XXV. *AWARD under an* ORDER OF NISI PRIUS AT THE ASSIZES, *that the* VERDICT *found for the Plaintiff do stand, &c.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the Inner Temple, Barrister-at-Law, send greeting. WHEREAS in an action wherein [*plaintiff*] was plaintiff and [*defendant*] and [*other defendant*] were the defendants, came on to be tried at the Assizes holden at , in and for the county of , on the day of , in the year of the reign of his present Majesty King

Recital of order of Nisi Prius;

Edward, before the Honourable Sir A. B. and the Honourable Sir C. D., two of the Justices of the High Court of Justice, being the Justices of our Lord the King appointed to take the Assizes for the said county of , according to the form of the statute in that case made and provided, It was ordered by the Court, with the consent of the said parties, their counsel and solicitors, that a verdict should be entered for the plaintiff, damages £ , costs forty shillings; But that such verdict should be subject to the award, arbitrament, and determination of me the said [*arbitrator*], who was by the same order empowered to direct that a verdict should be entered for the plaintiff or the defendants, as I should think proper; and to whom it was thereby referred to decide the said action and settle all matters in difference between the said parties; and to order and determine what I, the said [*arbitrator*], should think fit to be done by either of them, respecting the matters in dispute: so as I, the said [*arbitrator*], should make and publish my award in writing, concerning the premises, on or before the second day of the then next Michaelmas Term; AND it was also ordered, that the costs of the said cause should abide the event of my said award: And that the costs of this present reference and award should be in the discretion of me, the said [*arbitrator*], who might direct and award to and by whom, and in what manner, the same should be paid: AND WHEREAS I, the said [*arbitrator*], by writing under my hand, dated, &c., and endorsed on the said order, enlarged my time for making my award until the day of this instant November. NOW KNOW YE, that I, the said [*arbitrator*], having taken upon myself the burthen of the said reference, and having heard and duly considered the allegations, vouchers, proofs, and witnesses of the said parties, Do make and publish this my award, of and concerning the matters to me referred, as follows: that is to say, I award and order, that the verdict so found for the plaintiff, as aforesaid, shall stand and be in force: AND I further award and adjudge, that the defendants have not any claim or demand upon the said plaintiff, in respect of, or in any manner relating to, the vessel called the in the statement of claim in the said action mentioned: AND that the defendants shall pay to the plaintiff the costs of this reference and award, to be taxed by the proper officer of the same Court.

IN WITNESS, &c.

verdict for plaintiff, subject to reference;

which provided that the costs of the cause should abide the event of the award; that the costs of the reference should be in the discretion of the arbitrator;

recital of enlargement of time for making award.

Testatum.

Award that verdict found for plaintiff do stand;

that defendants have no claim on plaintiff in respect of a vessel mentioned in pleadings;

that defendants pay costs of reference and award.

XXVI. *AWARD under an* ORDER OF NISI PRIUS, *that the* CAUSE *shall cease; that the Defendant shall pay the Plaintiff a Sum for* HOLDING OVER *after the Expiration of the Lease; and a further Sum for* BREACH OF COVENANTS *in not repairing.*

[*After formal parts and recitals, continue:*]

NOW KNOW YE, &c. I award, and direct, that the said cause shall cease, and be no further prosecuted; AND that the

Award, cause to cease;

defendant to pay plaintiff a sum for holding over; and a further sum for breach of covenants.

said [*defendant*] shall pay to the said [*plaintiff*], on the day of next, the sum of £ , for the use and occupation, and as the value of the said premises, during the time the same were held over after the expiration of the said lease; and the further sum of £ , for and on account of the breach of the said covenants, so far as concerns the supporting, maintaining, keeping and leaving in repair the dwelling-houses and other buildings erected and standing on the said premises at the date of the said lease, or erected and built thereon during the said term for habitation: AND I further award and direct that the said [*defendant*] shall pay to the said [*plaintiff*] all his costs of the said action to be taxed by the officer of the Court, and shall also pay to the said [*plaintiff*] the costs incurred by the said [*plaintiff*] of and incident to the reference and the costs of this award, [and I assess the plaintiff's costs at £ in respect of the reference, and the costs of the award at £]. IN WITNESS, &c.

Costs of action, reference, and award.

Assessment of costs of reference and award.

XXVII. *AWARD under an* ORDER OF NISI PRIUS, *that the* PLAINTIFF *has no* CAUSE *of* ACTION.

[*After formal parts and recitals, continue:*]

Testatum. NOW KNOW YE, &c. I award, adjudge and determine that, at the time of commencing the said suit, the said [*plaintiff*] had no cause of action whatever against the said [*defendant*], in respect of the said matters to me referred: AND I thereupon award, and direct that instead of the said verdict and damages so found for the said [*plaintiff*], a verdict in the said action be entered for the said [*defendant*]. AND I further award and direct [*as to costs, see ante*, pp. 476, 485]. IN WITNESS, &c.

Award that the plaintiff had no cause of action; that, instead of verdict and damages for plaintiff, a verdict be entered for defendant.

XXVIII. *AWARD as to* COMPENSATION *for Land, &c., taken by a* CORPORATION, *wherein the* ARBITRATOR STATES A CASE *for the* OPINION *of the* COURT.

Recital of submission;

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*], of &c., send greeting. WHEREAS by an instrument in writing, dated the day of , 19 , and made in the matter of the Corporation of the Borough of (hereinafter called the said Corporation), and in the matter of the purchase by the said Corporation of lands of A. B., of &c., Esquire (hereinafter called the said owner), for the purposes of &c., and under the hand of the said A. B., and under the common seal of the said Corporation, After reciting [*recite special Act authorizing construction of waterworks, &c.*], and after reciting that the said owner and the said Corporation had determined in respect of all questions of disputed compensation to concur, pursuant to the Lands Clauses Consolidation Act, 1845, in the appointment of a single arbitrator

to settle and determine and award the purchase-money or respective purchase-monies and compensation or respective compensation under the said Acts to be paid by the said Corporation for the purchase by them free from incumbrances (other than customary rents and services) of the fee-simple and inheritance in possession of and in all freehold estates and of all estates of inheritance according to the custom of any manor of and in all customary hereditaments, lands, stints and rights respectively described and comprised in the claim of the said owner (of which a copy is annexed to the instrument now in recital), dated the day of , 19 , delivered by him in pursuance of the notice to treat served by the said Corporation (of which a copy is also annexed to the instrument now in recital), and for the damage that might be sustained by the said owner by reason of the execution of the works authorized by the first above-mentioned Act, it being the intent of the said notice to treat of the said claim, and of the submission now in recital, that the said owner should sell and the said Corporation should acquire not only the life estate of the said owner, but all such estate and interest as by the 7th section of the Lands Clauses Consolidation Act, 1845, or otherwise, the said owner was authorized to sell and convey: AND WHEREAS copies of the said notice to treat and claim, respectively annexed to the said recited instrument, are also respectively annexed to or written under these presents, and constitute the first and second schedules hereunto respectively: AND WHEREAS I, the said [*arbitrator*], took upon myself the said reference, and previously to entering upon the matters referred to me as aforesaid made and subscribed the declaration hereunto annexed: AND WHEREAS, by divers instruments under the hand of the said owner, and the seal of the said Corporation respectively, the time for making my award in the said matters in difference has been enlarged to the day of , 19 : AND WHEREAS upon the consideration of the said matters in difference it appeared that the hereditaments mentioned and described in the first schedule to the said notice of claim were hereditaments claimed by the said owner as tenant for life, and that hereditaments mentioned and described in the second schedule to the said notice of claim were hereditaments claimed by the said owner for an estate of inheritance in fee-simple in possession as to hereditaments described as being of freehold tenure, and for a customary estate of inheritance in possession as to hereditaments described as being of customary tenure, and I propose accordingly to award separately in respect of the respective hereditaments mentioned and described in such schedules to the notice of claim respectively: AND WHEREAS it also appeared that the said freehold hereditaments or parts thereof were formerly of copyhold or customary tenure, and are subject to reservations in favour of the lord of the manor of certain mines, minerals, rights, royalties and franchises specified in the indenture of the day of , 19 , mentioned in the first schedule to the said notice of claim, or as to others of such freehold

that notice to treat and claim are set out in schedules to award;

that arbitrator entered on the reference and made declaration;

of enlargement of time;

of nature and effect of claim;

of nature of the property;

as to stints, &c.; hereditaments in some other instrument of enfranchisement: AND WHEREAS upon the consideration of the said matters in difference the said owner claimed that the stints mentioned in the third and fourth schedules respectively to the said notice of claim were stints or cattle-gates constituting several tenements or interests in the soil (the ownership of the soil being in the stint owners), and the said owner claimed to be entitled to such stints accordingly, but the said Corporation alleged that the said stints amounted only to rights to take the herbage of common or fell by the mouths of cattle or sheep, such rights being enjoyed as appendant or appurtenant to certain other tenements of the said owner (the ownership of the soil of the common or fell being in the lord of the manor, subject to

as to bed of lake; such rights of pasturage): And the said owner also claimed the bed of the lake, being the lots mentioned last in the third and fourth schedules to the notice of claim respectively, and being in effect the lake called , such claim extending *ad medium filum* wherever the lands mentioned and described in the schedules to the said notice of claim were on one side only of the lake, and extending all the way across the lake wherever the said lands were on both sides of the

that such claims involve questions of title not matter of the reference: lake, but the said Corporation disputed such claim: AND WHEREAS I am advised that the aforesaid claims relating to the said stints and to the bed of the said lake involve questions of title which is not for me to determine, and I have accordingly awarded separately, with a view to such questions being determined by competent authority: AND WHEREAS upon the consideration of the said matters in difference it appeared that certain stints had been omitted by mistake from the fourth schedule to the said notice of claim, but by consent of the parties it was agreed that I should award in respect

as to collection, diversion, &c., of water. thereof notwithstanding such omission: AND WHEREAS upon the consideration of the said matters in difference, the said owner made a claim to compensation in respect of water collected, diverted or impounded upon the said lands mentioned and described in the said schedules to the notice of claim and in respect of the natural or peculiar adaptation of such lands for collection of water or as a suitable site for the construction of a reservoir, and I propose to state the fact relating thereto in the form of a special case as hereinafter appearing: AND WHEREAS the third schedule hereto contains an enumeration of certain documents which upon the consideration of the said matters in difference were put in evidence by counsel for the said Corporation, and which are herein entered only in consequence of the request of such counsel: AND WHEREAS the map or plan hereto annexed is a copy of the parliamentary plan used

Award: upon the consideration of the said matters in difference. NOW KNOW YE, AND THESE PRESENTS WITNESS, that I the said arbitrator, having fully and deliberately considered the said matters in difference, Do make this my award in writing in manner following, that is to say:—

as to amount of compensation for lands, &c. 1. I award and determine that the sum of £ is the value of the lands, hereditaments, stints and rights described and

comprised in the first and third schedules to the said notice of claim, including such mines and minerals, if any, as the said owner can sell; and I award and determine that the sum of £ is the value of the lands, hereditaments, stints and rights described and comprised in the second and fourth schedules to the said notice of claim, including such mines and minerals, if any, as the said owner can sell, and which respective lands, hereditaments, stints and rights are respectively required by the said Corporation; and I award and determine that the same sums of £ and £ , shall respectively be paid by the said Corporation to the said owner for the purchase by them, free from incumbrances (other than the said reservations to the lord of the manor affecting the said freehold hereditaments or parts thereof, but which reservations I consider and hereby find to be of no value, and other than customary rents and services) of the fee simple and inheritance in possession of and in all freehold estates, and of all estates of inheritance according to the customs of any manor, of and in all customary hereditaments, lands, stints and rights respectively described and comprised in the said claim of the said owner, dated the day of , 19 , and for the damage that may be sustained by the said owner, by reason of the execution of the works authorized by the first above-mentioned Act, but this my award and determination is subject as hereinafter mentioned or appearing.

as to stints; 2. I have, in my said award and determination, valued the said stints according to their value as rights to take the herbage of common or fell by the mouths of cattle or sheep, such rights being enjoyed as appendant or appurtenant to certain other tenements of the said owner (the ownership of the soil of the common or fell being in the lord of the manor, subject to such rights of pasturage); And I hereby award and determine for or in respect of the further or additional value of such stints, considered as stints or cattle-gates, constituting several tenements or interests in the soil (the ownership of the soil being in the stint owners), the further sum of £ , in respect of the stints mentioned in the third schedule to the said notice of claim, and £ in respect of the stints mentioned in the fourth schedule to the said notice of claim, the same sums of £ , and £ , to be paid by the said Corporation to the said owner for the purchase by them of such stints, in addition to the respective sums to be paid by the said Corporation as hereinbefore awarded.

as to lake; 3. I have, in my said award and determination, valued the portions comprised in the said claim of the said lake, known as , in respect of the value of the water only of the said lake to the owner of the lands mentioned respectively in the first and second schedules to the notice of claim, and adjacent to the said lake as riparian owner, and not in respect of any right to the bed of the said lake: And I hereby award and determine that the further sum of £ is the value of the bed of the said lake adjacent to the said lands and hereditaments, such bed extending

ad medium filum wherever such adjacent lands and hereditaments are on one side only of the lake, and extending all the way across the lake wherever such adjacent lands and hereditaments are on both sides of the lake; And I hereby apportion such sum of £ in the proportion or sums of £ for the portion of the lake mentioned in the first schedule to the notice of claim, and £ for the portion of the lake mentioned in the second schedule to the notice of claim; And I award and determine that the same sums of £ and £ shall respectively be paid by the said Corporation to the said owner for the purchase by them, free from incumbrances (other than customary rents and services, if any), of the fee simple and inheritance in possession, or customary fee simple and inheritance in possession, as the case may be, of the said adjacent bed of the lake, and for the damage that may be sustained by the said owner in respect of the said bed by reason of the execution of the works authorised by the first above-mentioned Act.

as to stints omitted from claim.

4. And so far as I lawfully can or may, I hereby award and determine that the value of the stints so far as aforesaid omitted by mistake from the fourth schedule of the notice of claim is the sum of £ , according to their value as mere rights of taking the herbage of common or fell by the mouths of cattle or sheep, such rights being enjoyed as appendant or appurtenant to other tenements of the owner (the ownership of the soil of the common or fell being the lord of the manor, subject to such rights of pasturage), and that the further sum of £ is the further or additional value of such stints considered as several tenements, including the ownership of the soil, such sum of £ , and, in case the stints are to be considered as several tenements as aforesaid, such further sum of £ to be paid by the said Corporation to the said owner for the purchase by them of such stints, in addition to the respective sums to be paid by the said Corporation as hereinbefore awarded.

Special case.

And by way of special case for the opinion of the High Court of Justice,

5. I hereby state, and find as facts, that the lands and hereditaments respectively described and comprised in the said claim of the said owner have by themselves, and in conjunction with other adjoining lands, a natural and peculiar adaptation for the collection, diverting and impounding of water, and as a suitable site for the construction of a reservoir.

6. I have in my awards and determinations hereinbefore contained, in estimating the value of the land, taken into consideration its enhanced value by reason of the water that may be collected, diverted and impounded upon the said lands and hereditaments of the said owner, and also by reason of its natural and peculiar adaptation for the construction of a reservoir, but I have not allowed for or included any sum in respect of the enhanced value of the land by reason of its natural and peculiar adaptation

in conjunction with other adjoining lands for the collection, diverting and impounding of water, and as a suitable site for the construction of a reservoir: And I hereby submit for the opinion of the Court whether or not I ought to have allowed for and included any sum in respect of such last-mentioned enhanced value.

7. If the Court shall be of opinion that I ought to have allowed for and included a sum in respect thereof, then I hereby award and determine such sum to be the further sum following, that is to say: If upon the determination of the question of title it shall appear that the said bed of the said lake adjacent to the other lands described and comprised in the claim of the said owner forms part of the hereditaments to be purchased as aforesaid by the said Corporation from the said owner, then the sum of £ ; but if it shall appear that the said adjacent bed of the lake does not form part of the said hereditaments so to be purchased as last aforesaid, then the sum of £ ; And I hereby apportion the said sums of £ , or £ as the case may be, between the said hereditaments mentioned in the first and second schedules respectively to the said notice of claim in the proportions or sums of £ , or £ as the case may be, in respect of the hereditaments mentioned in the first schedule to the notice of claim, and £ , or £ as the case may be, in respect of the hereditaments mentioned in the second schedule to the notice of claim; the same apportioned sums to be paid by the said Corporation to the said owner for the purchase by them of the hereditaments so to be purchased by them as aforesaid, in addition to the other sums to be paid by the said Corporation as hereinbefore awarded. IN WITNESS, &c.

THE FIRST SCHEDULE ABOVE REFERRED TO.

THE SECOND SCHEDULE ABOVE REFERRED TO.

THE THIRD SCHEDULE ABOVE REFERRED TO.

Arbitration, in International Law, is the reference of disputes between independent States to one or more arbiters chosen by the parties.

This method of avoiding an armed conflict dates back to ancient times, and has never ceased to be resorted to from time to time in cases where the parties did not consider the issue essential enough to warrant an appeal to arms.

During last century and the present century a large increase in the causes of international friction has necessarily resulted from greater facilities of intercourse between nations. This and, on the other hand, the immense stake European Powers have in the preservation of peace, where war means the mobilisation of armed nations, encouraged a hope among humanitarians that this mode of settlement might be extended to all kinds of difficulties between States. [Under the Hague Peace

Convention of 1889, to which twenty-six States were parties, and to which the American States represented at the Conference of Mexico in 1901 resolved to adhere, a Permanent Court of International Arbitration was established, with its seat at the Hague, composed of a panel of judges on which each signatory State is represented by four persons. From this body is selected a tribunal for each particular case of arbitration submitted to the Court, generally each party choosing two arbitrators, and these jointly an umpire. A permanent Bureau and Council is established, consisting of the diplomatic representatives of the signatory Powers accredited to the Hague, under the presidency of the Foreign Minister of the Netherlands, and a code of procedure is prescribed. The first case heard before the tribunal (in April 1902) was a question arising between Mexico and the United States as to which was liable for the payment of the endowment granted to the missions established in California before its annexation to the United States; and several recent treaties (*e.g.* Germany and Holland as to submarine cables in the United States) provide for resort being had to this tribunal to determine any differences. Besides this optional method of arbitration, a movement has recently taken place in favour of compulsory arbitration treaties between particular nations, binding them to resort to arbitration in all or most causes of difference, such as the Olney-Pauncefote Treaty of 1897, which failed to obtain ratification from the United States Senate; that between Italy and Argentine which similarly failed; a treaty for obligatory arbitration in cases of diplomatic privileges, rights of navigation, boundaries, validity, interpretation and enforcement of treaties signed by the American Republics at Mexico in 1901 (*Law Mag. and Rev.* xxvii. 459).]

In the course of the last and present centuries a hundred or more differences between States have been decided by arbitration, and the increasing number of such cases in successive years shows it is growing in favour among Governments.

We have the authority of the present Lord Chief Justice, Lord Alverstone, then Sir Richard Webster, A.-G., for saying that it is no longer thought necessary to "advocate the principle of International Arbitration; it is now regarded as so fully recognised by all civilised nations that it has become unnecessary to argue in its support" ("Address delivered by the Attorney-General, in 1895, at the 17th Conference of the Association for the Reform and Codification of the Law of Nations," *Report*, p. 37).

International jurists, however, are generally agreed that arbitration is not adapted for a certain class of conflicts. Thus, M. Rolin-Jacquemyns, the honorary President of the Institute of International Law, excludes from the sphere of arbitration all questions which menace the honour or the existence of States ("Le problème final du droit international," *Revue de droit international*, 1877, p. 161).

Lord Chief Justice Russell, in the same order of ideas, said, "Men do not arbitrate where character is at stake, nor will any self-respecting nation readily arbitrate on questions touching its national independence or affecting its honour" ("Address at Saratoga to the American Bar Association," August 20, 1896).

Lord Alverstone classed, in the speech above quoted, the typical cases susceptible of arbitration as follows:—

1. Cases of boundary.

2. Cases of damage for an admitted wrongful act.

3. Cases of dispute involving questions of legal right.

M. Rouard de Card subdivides them into cases of boundaries, possession of territory, seizure of vessels or confiscation of cargoes, violent or arbitrary acts against foreigners, rights of navigation, fishery rights, and matters of accounts (*Destinées de l'arbitrage international*, Paris, 1892, p. 208).

But if the sphere of arbitration is to be thus limited, may we not ask with Professor Lorimer, "whether the class of cases which remain to it be not precisely those which have hitherto been disposed of perhaps just as surely and more quietly by diplomacy?" "The percentage of international differences which led to war," observes that author, "was always limited; and if this percentage cannot be limited still further by referring some of them to arbitration, then arbitration becomes merely a method by which diplomatists may ascertain facts, assess damages, and the like" (*Law of Nations*, ii. p. 212).

If, however, diplomacy could have disposed of the matters which have been submitted to arbitration, is it not probable they would have been so disposed of? It is even to be assumed that, though clauses have been inserted in a number of the more recent treaties of commerce and navigation, providing that difficulties of construction and application shall be submitted to arbitration, such difficulties will only be considered to exist where diplomacy has failed to dispose of them.

The honour of a State is, of course, pledged to the acceptance and due fulfilment of an award delivered by a tribunal or arbiter duly appointed by the parties to the treaty of submission.

The jurists allow the following cases of repudiation, and no others:—When the Court has exceeded its powers under the treaty of submission; when the award has been procured by fraud, or its meaning is obscure; and where it is absolutely contrary to the acknowledged principles of international law.

The following is a list of arbitrations to which Great Britain has been a party since 1800:—

1. Great Britain and United States (1816). St. Croix River and the Lake Boundaries. Referred to three Commissioners.

2. Great Britain and United States (1822). Restoration of slaves in possession of the British at time of ratification of the Treaty of Ghent. Referred to the Emperor of Russia. Award in favour of United States.

3. Great Britain and United States (1827). Boundary of United States. King of the Netherlands chosen arbitrator. Award given 10th January 1831, not accepted by United States. Matter afterwards settled by compromise in 1842.

4. Great Britain and France (1842). Claims for injuries sustained by British merchants through omission to notify blockade of the Portendic coast of Morocco by France. Referred to the King of Prussia, who gave his award in favour of Great Britain.

5. Great Britain and United States (1853). Value of slaves who captured the ship *Creole*, sailed to a British port, and were there liberated. Award in favour of American claim.

Great Britain and Portugal (1858). Croft affair. Hamburg Senate chosen arbitrator.

Great Britain and Portugal. Shootridge affair. Referred to Senate of Hamburg as arbitrator.

6. Great Britain and Brazil (1863). Imprisonment of British naval officers at Rio de Janeiro. Referred to King of the Belgians, who decided in favour of Brazil.

7. Great Britain and Peru (1864). Referred to Hamburg Senate, who decided that the claim was based upon exaggerated statements.

8. Great Britain and Spain (1867). On seizure by Spain of the ship *Mermaid.*

9. Great Britain and Portugal (1869). Rival claims to the sovereignty over the island of Bulama, on the West Coast of Africa. Referred to President of the United States, who decided in favour of Portugal.

10. Great Britain and United States (1871). *Alabama* affair. Referred to a High Commission, consisting of five members, nominated by United States, Great Britain, Italy, Switzerland, and Brazil. Met at Geneva. Award in favour of the United States. See ALABAMA CASE.

11. Great Britain and United States (1871). Claims arising out of War of Secession. Referred to a Mixed Commission of three members, which adjudged the United States to pay £386,000 to Great Britain.

12. Great Britain and United States (1871). San Juan affair. Referred to Emperor of Germany, who decided in favour of the American claim.

13. Great Britain and United States (1871). Nova Scotia Fisheries. Referred to three Commissioners. Award in favour of Great Britain, American Commissioner dissenting and withdrawing from the arbitration. It was, however, accepted, and the amount voted by Congress.

14. Great Britain and Brazil (1873). Dundonald claims. Referred to United States and Italian Minister at Rio, who decided against Brazilian Government.

15. Great Britain and Portugal (1875). Territories and islands of Delagoa Bay. Referred to Marshal MacMahon, President of the French Republic, who decided in favour of Portugal.

16. Great Britain and Columbia (1875). Pecuniary claims of British firm of merchants against Columbia.

17. Great Britain and Liberia (1879).

18. Great Britain and Nicaragua (1879). Question of sovereignty over Mosquito Indians. Referred to Emperor of Austria. Award in favour of Great Britain.

Great Britain and Chili (1883). Damage incurred by British subjects in war between Chili, Peru, and Bolivia. Referred to mixed commission.

19. Great Britain and Spain (1887). Collision. Referred to the Italian Government.

20. Great Britain and Portugal (1890). Seizure of the Delagoa Bay Railway by Portugal. Referred to three Swiss arbitrators.

21. Great Britain and Germany (1890). Island of Lamu, east coast of Africa. Referred to Baron Lambermont, Belgian Minister of State. Award in favour of Great Britain.

22. Great Britain and France (1891). Newfoundland Fisheries. Referred to a commission of seven, two representatives of each government, and three specialists, namely, Professor de Martens of St. Petersburg, Professor Rivier of Brussels, and M. Gram, Norway.

23. Great Britain and United States (1891). Behring Sea Seal Fisheries. Referred to commission of seven, namely, Baron de Courcel

(France); Lord Hannen and Sir John Thompson (Great Britain); Judge John T. Harlan and Senator J. T. Morgan (United States); The Marquis Visconti Venosta (Italy); and M. Gram, representing Sweden and Norway. Award in favour of Great Britain.

[24. France (1892). Delimitation of frontier between French Guinea and Sierra Leone.

25. Russia and Afghanistan (1893). Questions as the use of the river Kushk.

26. France (1893). Greffuhle concessions. Damages to French subjects by English occupation of Zanzibar.

27. Chili (1893). Claims of British subjects for losses in Chilian War of 1891.

28. Portugal (1895). Maaicaland boundary.

29. Nicaragua (1895). Injury to British subjects.

30. Holland (1895). *Costa Rica* packet seized by Dutch officials.

31. United States (1896). Damages due to Canadians under Behring Sea Fishery Award of 1893.

32. Columbia (1896). Injury to British subjects.

33. Brazil (1896). Title to the islet of Trinidad.

34. France (1896). Niger boundary.

35. Venezuela (1896). Boundary between Venezuela and British Guiana.

36. United States (1897; January 1903). Boundary of Alaska and British possessions.

37. Germany (1897). Losses by German subjects in South-East Africa.

38. Belgium (1897). Expulsion of Mr. Ben Tillett.

39. Russia (1898). Seizure of Canadian vessels.

40. France (1898). Supplemental to Niger Convention delimiting boundaries.

41. United States (1898). Arbitral Joint Commission to consider all controversies between the United States and Canada.

42. Brazil (1899). Guiana boundary.

43. Russia (1899). British subjects' claim to property in Russian concession at Hankow.

44. Germany and the United States (1899). Compensation for injury owing to the occupation of Samoa.

45. Portugal and the United States (1900). Delagoa Bay Railway compensation.

46. France (1901). "U'aima" and "Serjeant Malaruine" affairs in West Africa.

47. Russia (1902). Tientsin.

48. Holland (1902). Guiana boundaries.

49. Germany (1902). Delimiting frontier west of Lake Victoria in Central Africa, and Gold Coast and Togo Hinterland boundary.

50. France (1904). Effect of issue of French flags and ships' papers to subjects of the Sultan of Muscat.]

Besides works quoted above, see Kamarowsky, *Le tribunal international* (translated into French by M. Westman); and publications of the Peace Society, International Arbitration League, *Bureau interparlementaire, pour l'arbitrage international;* Reports of the International Law Association, *Annuaires de l'Institut de Droit International;* [Darby, *International Tribunals,* 1900].

Arch.—See RAILWAY.

Archbishop (Latin, *Archiepiscopus*).—The title of archbishop was originally only one of honour, and did not convey to its holder any jurisdiction or authority. It first appears in the fourth century, and is applied to St. Athanasius. The Council of Nicæa recognise, however, the pre-eminence of certain bishops, as of Alexandria, Rome, and Antioch. After the conversion of Constantine, the metropolitan, that is the bishop who presided over the church of the chief city of the province—for the Christian Church had by that time brought its ecclesiastical organisation into correspondence with that of the State—began to convoke provincial councils, and generally to exercise a superintendence over the other bishops and clergy in his province. In the eighth century the use of the title of archbishop became common among leading bishops, and gradually it has been extended to nearly all metropolitans. It was at one time occasionally used of bishops who were probably not metropolitans. Thus, early writers apply the title to the bishops of St. David's, and even Bangor in Wales. St. Augustine was consecrated Archbishop of the English by Vergilius, Archbishop of Arles, in 597 A.D.

English law recognises at present only two archbishops and provinces in England—Canterbury and York. The See of Canterbury was founded by King Ethelbert in 597 or 598, and the first archbishop was St. Augustine. The See of York was founded about A.D. 622 by Edwin, King of Northumbria. The first archbishop was Paulinus. An archbishopric of Lichfield was afterwards established, but soon abolished, and the Welsh dioceses remained for several centuries outside both provinces. They now form a constituent part of the province of Canterbury. These are subordinate to each archbishop, who has within his province bishops of several dioceses. The suffragans of the Archbishop of Canterbury are seventeen bishops, holding sees of ancient foundation, viz.: Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Lichfield, Hereford, Llandaff, S. David's, Bangor, and S. Asaph; four bishops of sees founded by King Henry VIII. upon the dissolution of the monasteries, viz.: Gloucester and Bristol, Peterborough, Oxford; and three bishops of sees founded in the last reign, viz.: S. Albans, Truro, and Southwell. [The bishops of the newly constituted sees of Southwark and Birmingham are subject to the metropolitan jurisdiction of the Archbishop of Canterbury (Bishoprics of Southwark and Birmingham Act, 1904, 4 Ed. VII. c. 30, 2nd sched.).] The suffragans of the Archbishop of York are the bishops of Durham, Carlisle, and Sodor and Man, three ancient sees, the last annexed to York by King Henry VIII.; the bishop of Chester, a see founded by King Henry VIII.; and the bishops of Ripon, Manchester, Liverpool, Newcastle-on-Tyne, and Wakefield, all five modern sees, and founded, with the exception of Ripon, in the last reign. Until the latter half of the fifteenth century, the Archbishop of York enjoyed a metropolitan jurisdiction over the bishops of Scotland, all of whom derived their consecration from and swore canonical obedience to him; but in 1470 Pope Sixtus IV. created the Bishop of S. Andrews archbishop and metropolitan of all Scotland. Similarly, the Archbishop of Canterbury enjoyed, until 1152, the primacy over all Ireland. Each archbishop has the right of consecrating bishops in his province. The Archbishop of Canterbury is styled "Primate and

Metropolitan of all England," although there is another archiepiscopal province within the realm; partly because, before the Reformation, he exercised, as papal legate, authority in both provinces, and partly because he has, by Stat. 25 Henry VIII. c. 21 (1533), the power of granting (in both provinces alike) dispensations in any case, not contrary to the Holy Scripture and the laws of God, in which the Pope used to grant them. In the first century after the Norman Conquest, the Archbishop of Canterbury seems sometimes to have been styled patriarch, *orbis Britannici Pontifex*, and even *alterius orbis Papa*. He has the privilege of crowning the king; when vested in the archbishopric he is said to be enthroned, while a bishop is merely installed; and divers bishops are his officers: the Bishop of London his provincial dean, the Bishop of Winchester his chancellor, the Bishop of Salisbury his precentor, and the Bishop of Worcester his chaplain. He may retain and qualify eight chaplains, enjoys the titles of Grace and Most Reverend Father in God, and writes himself "by Divine Providence," not, as bishop, "by Divine permission." He is the first peer of the realm, ranking immediately after princes of the Blood Royal, and before all the nobility and officers of State. The Archbishop of York is styled "Primate of England," and shares with the Archbishop of Canterbury the titles of Grace and Most Reverend Father in God; like the other primate, he writes himself "by Divine Providence," is said to be enthroned, and may retain and qualify eight chaplains; and he has the special privilege of crowning the Queen Consort, and of being her perpetual chaplain. He ranks immediately after the Archbishop of Canterbury and the Lord Chancellor. An archbishop is recognised by the English law as having two concurrent jurisdictions: one as bishop within his own diocese (see BISHOP), the other a jurisdiction through his whole province to correct and supply defects of other bishops. Thus he may visit and inhibit a bishop in his province, and cite him for ecclesiastical offences (*Ex parte Read*, 1888, 13 P. D. 221; and see *Read* v. *Bishop of Lincoln*, 1889, 14 P. D. 88). An appeal from his Court lies to the Judicial Committee of the Privy Council. Under Stat. 1 & 2 Vict. c. 106, ss. 43, 54 (1838), an appeal lies to him from the bishop in case of refusal of licence of non-residence, and in case of sequestration. The powers given to the Archbishop of Canterbury by the before-mentioned statute of 1533 are chiefly exercised in granting licences to be married at any place and time, and to hold two livings at once. He also (but not the Archbishop of York) may grant degrees of all kinds, and visit both Universities. If any see is vacant, the archbishop is guardian of the spiritualities by prescription or composition, whereby all episcopal rights of the diocese belong unto him, and all ecclesiastical jurisdiction is exercised by him or his commissioners for the time; but by canon law the dean and chapter are guardians. An archbishop, on receipt of the royal writ, calls the bishops and clergy within his province to meet in convocation. See CONVOCATION. An archbishop, at common law, is a corporation sole. As to the mode of election of archbishops, see BISHOP; CONGE D'ELIRE. As to the right of an archbishop to sue to restrain the waste of ecclesiastical property, see GLEBE. See also Public Worship Regulation Act.

[*Authorities.*—Phillimore, *Ecclesiastical Law*, 2nd ed.; Godolphin, *Reportorium*; Hook, *Ecclesiastical Dictionary*.]

Archdeacon.—An ecclesiastical officer subordinate to a bishop,

and in modern times exercising a certain jurisdiction arising out of grant from the bishop.

The office of archdeacon, it is scarcely necessary to say, has existed from the earliest times in the Church of England. The division of the country into archdeaconries commenced only after the Norman Conquest. Prior to that date, the archdeacon appears merely as an officer attached to the bishop, and in some respects he resembled rather the modern chancellor, or vicar-general, as he had a general capacity to act for the bishop as such throughout the whole diocese. Gibson says, the power of the archdeacons in that ancient state was chiefly a power of inquiry and inspection, which Lyndwood calls *scrutatio simplex* when explaining, in the following words, the common-law position of an archdeacon: "Visitationem per modum scrutationis simplicis, tanquam Episcopus Vicarii, habet Archidiaconus de jure communi" (Lyndwood, *Prov.* p. 49; Gibs. *Cod.* tit. xlii. ch. viii. p. 969).

It is doubtful when the archdeacon commenced to exercise judicial functions. Before the Norman Conquest, however, when ecclesiastical like civil business was transacted in the Court of the Hundred, the archdeacon appears occasionally to have sat as a judge for the bishop, and thus before the ordinance of William I., separating the spiritual from the temporal courts, he had apparently commenced to exercise judicial functions as the bishop's delegate. The words in the ordinance are: "Propterea mando et regia auctoritate præcipio, ut nullus episcopus vel ARCHIDIACONUS de legibus episcopalibus amplius in hundret placita teneant, nec causam quæ ad regimen animarum pertinet ad judicium sœcularium hominem adducant" (Stubbs, *Select Charters and Documents*, p. 85).

This ordinance, which established the Consistory Courts (*q.v.*), enabled the bishops to assign to archdeacons in the several districts appointed to them a delegated episcopal jurisdiction, to be exercised archidiaconally by them. All such rights, however, of whatever kind, arise by grants, either made voluntarily, or of necessity (*i.e.* claimed and insisted on upon the footing of long usage), or by composition. The archdeacon is, however, in the eyes of the law, properly *ordinarius*, and is recognised as such by the books of common law, which adjudge an administration made by him to be good, though it is not expressed by what authority it is made, because, as it is done by the archdeacon, it is supposed to be done *jure ordinario*.

As a result of the constitution of archdeacons in particular localities, and the division of the country into archdeaconries, the general capacity of archdeacons to act as the bishop's vicars-general came to an end (see VICAR-GENERAL; OFFICIAL PRINCIPAL).

It naturally followed from the origin of the office that the official powers of archdeacons varied considerably in different places, but by 6 & 7 Will. IV. c. 77, s. 19, it was enacted that all archdeacons throughout England and Wales should have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding. The judge of the Archdeacon's Court, when the archdeacon does not sit in person, is called the official. The Act 24 Hen. VIII. c. 12, provides for an appeal from the Archdeacon's to the Bishop's Court; but where the archdeacon has a peculiar, the appeal lies to the court of the archbishop (see *Parham* v. *Templer*, 1820, 3 Phillim. Rep. 243). In *Robinson* v. *Godsalve*, 1697, 1 Raym. (Ld.) 123, it was decided

that where an archdeacon has a peculiar jurisdiction, he is totally exempt from the power of the bishop, and if any person who lives in the peculiar be sued in the Bishop's Court, a prohibition shall be granted; but if the archdeacon has not a peculiar, proceedings may be indifferently commenced in the Bishop's or Archdeacon's Court (see PECULIAR). There are only a few reported cases of modern decisions by an Archidiaconal Court, and they mostly relate to such matters as the giving of faculties and the appointment of churchwardens. They include the following:— *The Churchwardens of St. John's, Margate*, v. *The Parishioners, Vicar, and Inhabitants of the same*, 1794, 1 Hag. Con. 198; *Adey* v. *Theobald*, 1836, 1 Curt. 447; *R.* v. *Archdeacon of Middlesex*, 1835, 3 Ad. & E. 615; *Westerton* v. *Davidson*, 1854, 1 Sp. Eccl. & Adm. p. 385.

Proceedings in the Archdeacon's Court, as in other ecclesiastical courts, are commenced by citation.

Since the Church Discipline Act, 1840, 3 & 4 Vict. c. 87, ss. 22 and 23, no criminal suit for an offence against the laws ecclesiastical can be instituted against a clerk except in the Archbishop's or Bishop's Court, and the jurisdiction of the bishop or archbishop is extended to places exempt or peculiar, situate in the bishopric or archbishopric.

An archdeacon within the jurisdiction of his archdeaconry may have his visitation every year, but is obliged to make a triennial visitation. In all matters relating to his jurisdiction, the archdeacon has authority by custom over lay as well as ecclesiastical persons, and where he may take cognisance of a matter, then he may also give sentence and condemn. It is expressly enjoined in the Canons "that archdeacons and their officials shall at their visitation of churches take the fabric thereof into special consideration, specially of the chancel, and in case there be need of reparation shall set or fix a time within which such reparations shall be finished, which time is likewise to be set under a certain penalty." See RATES (CHURCH).

An archdeacon has, since the time of Henry I., been summoned to Convocation, and he is at law a corporation sole. See CORPORATIONS. By the Canon Law he must be twenty-five years of age. An archdeacon may not grant letters dimissory (see DIMISSORY LETTERS). At Canon Law he is the proper authority to examine candidates for holy orders. The following are the principal modern statutes relating to archdeacons:—

14 Car. II. c. 4.—Under this Act archdeacons must read the common prayer, and declare their assent thereto before the ordinary.

6 & 7 Will. IV. c. 79.—Under this Act all the archdeaconries in England and Wales are to be in the gift of the bishop in whose diocese they are situated; and see *supra*.

1 & 2 Vict. c. 106.—Under this Act an archdeacon may, with certain exceptions, hold two benefices with an archdeaconry, or a benefice and a cathedral preferment.

3 & 4 Vict. c. 113, ss. 6, 16, 27, 33, 34, 35, 36, 37.—Under this Act it is provided that in any cathedral church in which, by the suspension of canonries, the number of canons is reduced to four, one of such suspended canonries may, by the authority thereinafter provided, if it be deemed necessary for the purpose of endowing an archdeaconry or archdeaconries, be filled up subject to the provisions thereinafter contained respecting the endowment of archdeaconries by the annexation of canonries thereto. Special provisions are made in the same Act for

the appointment of an Archdeacon of London or Lincoln, to the new canonries added by the Act to the chapters of the cathedral churches of St. Paul's, London, and Lincoln. It is also enacted that no person shall be appointed to an archdeaconry who has not been six years in priest's orders (Cripps, *Laws of the Church and Clergy*, 133-135).

The same statute also provides the endowment of archdeaconries, and mentions an archdeacon as among those persons who may act as an episcopal assessor under sec. 86, 7 & 8 Vict. c. 59. See ASSESSORS. Under this Act the Archdeacon's Court is empowered to deal with questions relating to parish clerks.

See also the Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43, as to the election of surveyors of dilapidations, and 34 & 35 Vict. c. 44 (Incumbents Resignation Act, 1871), as to an archdeacon being a commissioner thereunder, sec. 50. See also, on the same point, 48 & 49 Vict. c. 54, s. 3; 4 & 5 Vict. c. 39, as to further provisions for endowment of archdeaconries; 6 & 7 Vict. c. 77, as to Welsh archdeaconries; Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 44. Under this last Act an archdeacon may make representations as to any church or burial-ground in his archdeaconry.

[See Gibs. *Cod.* 5; Phillimore's *Ecclesiastical Law*, 2nd ed., vol. i.; Lyndwood, *Prov.*; Hook, *Ecclesiastical Dict.* 7; Bingham, *Antiquities of the Christian Church.*]

Archdeacon's Court.—See ARCHDEACON.

Arches, Court of.—The Court of Arches, otherwise called the Arches Court of Canterbury, is the tribunal wherein the appellate jurisdiction of the Archbishop of Canterbury, as Metropolitan of the province of Canterbury, is exercised. See ARCHBISHOP. The Court is so named from its having been anciently held in the Church of St. Mary-le-Bow (*in ecclesiâ Beatæ Mariæ de Arcubus*), London. This parish was one of thirteen in the City of London which formerly belonged to the Archbishop's peculiar jurisdiction, exempt from that of the Bishop of London. The Official Principal (*q.v.*) originally exercised the Metropolitan jurisdiction, the Dean of the Arches being a distinct officer who exercised the peculiar jurisdiction. The custom obtained of substituting the Dean of the Arches for the Official Principal in the latter's absence. For several centuries no Dean of the Arches has been appointed *eo nomine*, though the title has been commonly applied to the Official Principal.

The Court of Arches, as the Provincial Court of Appeal, has cognisance of appeals from the Consistory Courts (*q.v.*) of the various dioceses in the province of Canterbury, and, from the exercise of his ordinary or visitatorial jurisdiction, in contentious causes or matters, by any bishop of the province (*Boyd* v. *Phillpotts*, 1874, L. R. 4 Ad. & Ec. 297). By the Statute of Appeals (24 Hen. VIII. c. 12, s. 6), appeals must be interposed within fifteen days of sentence.

By letters of request from any ordinary of the province, the Court also entertains in the first instance suits in the cognisance of such ordinary. This jurisdiction was expressly reserved by the Statute of Citations (23 Hen. VIII. c. 9), and considerably extended by the Church Discipline Act, 1840, 3 & 4 Vict. c. 86, s. 13 (*Sheppard* v. *Phillimore*, 1869, L. R. 2 P. C. 450). A citation to the Court was termed a decree

under seal. It has been held that the judge of the Arches Court has the power himself to deprive a clerk, notwithstanding Canon 122 of 1603 (*Burgoyne* v. *Free*, 1829, 2 Hag. Ec. 456, 662; *Bonwell* v. *Bishop of London*, 1861, 14 Moo. P. C. 395; 15 E. R. 354).

Formerly proctors (*q.v.*) had an exclusive right to practise in the Court of Arches, but now, by the Solicitors Act, 1877, 40 & 41 Vict. c. 25, s. 17, solicitors have a co-ordinate right. Barristers seem to have a right of audience in lieu of advocates, merely *ex necessitate rei* (see the Court of Probate Act, 1857, 20 & 21 Vict. c. 77, ss. 116, 117; and *Mouncey* v. *Robinson*, 1867, 37 L. J. Eccl. 8).

By the Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 85, it was enacted (sec. 7) that the Archbishops of Canterbury and York might, subject to the approval of Her Majesty, appoint from time to time a practising barrister of ten years' standing, or a person who had been a judge of one of the superior Courts (being a member of the Church of England), to be, during good behaviour, "a judge of the Provincial Courts of Canterbury and York;" and that whensoever a vacancy should occur in the office of Official Principal of the Arches Court of Canterbury, the judge should become *ex officio* such Official Principal, and all proceedings thereafter taken before the judge in relation to matters arising within the province of Canterbury should be deemed to be taken within the Arches Court of Canterbury.

In pursuance of this Act, Lord Penzance, who had been successively a Baron of the Exchequer and judge of the Courts of Probate and Divorce, was on 28th October 1874 appointed by the two Archbishops "the judge of the Provincial Courts of Canterbury and York" for the purposes of the Act. The Queen signified her approval on 14th November 1874. Sir Robert Phillimore, who had been since 1st August 1867 Official Principal of the Arches Court, resigned that office on 20th October 1875, whereby Lord Penzance became, by force of the Act, statutable Official Principal (*Dale's Case*, 1881, 6 Q. B. D. 376; see also *Green* v. *Lord Penzance*, 1881, 6 App. Cas. 657).

Notwithstanding such statutable title, the then Archbishop (Tait), on 22rd March 1878, purported to give Lord Penzance a confirmatory patent in the office of Official Principal of the Arches Court of Canterbury. This patent, whatever its original value, not having been confirmed by the Dean and Chapter of Canterbury, is probably not binding on the successors of the archbishop who granted it. Lord Penzance's title, it is conceived, rested solely on the Act of 1874. [At the commencement of 1899, Lord Penzance resigned the statutable office of "a judge of the Provincial Courts of Canterbury and York," created by the Public Worship Regulation Act, 1874, s. 7. On 20th April 1899 Archbishop Temple gave a patent for life in the ancient form (Phill. *Eccl. Law*, ii. 924) to Sir Arthur Charles, an ex-puisne justice of the Queen's Bench Division, as Official Principal of the Arches Court. This patent was confirmed by the dean and chapter, and thus became binding on the Metropolitan See. There was a similar confirmation of the patent of Sir Lewis Dibdin, Sir Arthur Charles' successor.]

The Clergy Discipline Act, 1892, 55 & 56 Vict. c. 32, s. 4, gives an appeal against any judgment of a Consistory Court under that Act, at the option of the appellant, to the Provincial Court (*q.v.*), or to the Queen in Council; but if to the Provincial Court, its decision is final.

In other cases an appeal lies from the Arches Court to the Queen in Council (see the Privy Council Appeals Act, 1832, 2 & 3 Will. IV. c. 92, and the Judicial Committee Act, 1833, 3 & 4 Will. IV. c. 41; see also APPEALS).

The general practice of the Court is regulated by the Rules of 1st January 1867, for which see 36 L. J. Eccl. 1; [and, as to appeals, see new rules under 10 Geo. IV. c. 53, s. 9, W. N., [1903] Sept. 12, p. 245].

The special procedure under the Public Worship Regulation Act, 1874, is regulated by the Rules and Orders of 22nd February 1879, made under sec. 19 of that Act, for which see 4 P. D. 250.

[Godol. *Abr.* 100; Gibs. *Cod.* 1004; Phillimore, *Eccl. Law*, 2nd ed., ii. 924; Report of Ecclesiastical Courts Commissioners, 1883.]

Architect.—Like the word engineer, which may mean a civil engineer, a practical engineer, or an engine-driver, the word architect has a very comprehensive meaning.

An architect in the highest and best sense of the word should have qualified himself for his profession by the study of ancient architecture, and should have seen, sketched, and measured the best examples at home and abroad. His studies should of necessity have been very wide; for while devoting himself more especially to church architecture, domestic architecture, and the architecture of public buildings, he cannot neglect colour decoration, metal-work, and all the various subjects which are comprehended in the design and execution of a work of artistic and architectural merit.

These studies will, however, be of little use to him unless he has also acquired sufficient practical knowledge to advise his employer as to the probable cost of the proposed work, and to keep within such limits in carrying out the work which he has designed.

The practical knowledge which an architect must possess includes a thorough acquaintance with the materials which he intends to use, both as to their strength and durability and as to their method of application to the work.

It is the difficulty of finding these practical and business qualifications, combined with artistic acquirements, in one individual, which makes great success as an architect such a rare occurrence.

Disputes are constantly occurring between the members of the architectural profession as to whether an architect should be an artist, and whether, if he is an artist, he can, without lowering his position, stoop to consider practical matters, or the ways and means of carrying out his designs.

But there can be no doubt that the general public, whenever they consult an architect, however artistic and whatever his architectural knowledge may be, have a right to expect that the person whom they consult should know the practical as well as the artistic side of his profession, and that he should have sufficient business knowledge of prices and of ordinary contracting work not to lead his employer into extravagance, or into monetary or other liabilities beyond what may have been agreed upon between them.

It is as little satisfaction to an employer to possess a building which has cost twice what he intended to spend, as to have an ugly building built within the estimated cost.

Having thus described what may be termed the general nature of the profession, it is necessary to describe shortly the various branches.

There is the architect, for instance, whose practice lies in building warehouses and business premises. He, instead of requiring artistic knowledge (though such qualifications are always of advantage), must have almost an engineering acquaintance with the strength of materials, as, for instance, with the strains of girders and the crushing weight of columns.

There are other architects who are specialists in theatre, hospital, school, or other buildings, as the case may be: each line of work requiring special knowledge.

There is also the architect who designs and superintends the erection of villa residences, and undertakes any ordinary everyday building work which may fall in his way. He may not, and probably in many cases does not, know the difference between one style of architecture and another, yet he may possess very considerable practical knowledge and business qualifications.

And so one may descend the ladder, until one finds the architect who mixes up his profession with that of an auctioneer, or even with that of a builder, for no diploma or examination is necessary to enable a man to call himself an architect, to practise as such, and to recover fees for his services.

If architects, however, practise as valuers, or value materials and labour otherwise than merely for the information of their employer, they must be duly licensed under 46 Geo. III. c. 43, ss. 4-7. This necessity of obtaining a licence to value appears to have been overlooked by the architectural profession, for few architects take out any such licences.

The duties and liabilities of architects are fully set out in Hudson on *Building Contracts*, pp. 24-74. But, briefly, the architect's duties and liabilities are limited to the work he is employed to perform.

If he is only asked to prepare designs, his duty consists in preparing proper and suitable designs, or in preparing them according to instructions. On the other hand, if he is employed to carry out the building from the designs he has prepared, his duties become very varied and complicated, and his liabilities also are not inconsiderable.

From the date of such instructions he becomes the agent of the building owner, and he is liable just the same as any other agent would be if he exceeds his authority.

His duties also consist in advising his employer as to the cost of the proposed work; in negotiating with builders in reference to their employment, whether with or without a previous estimate; in preparing working drawings for the execution of the works, and in superintending them; in certifying for payment to the builder from time to time; and, finally, in passing the building and settling up the accounts.

Any negligence in the performance of such duties would render the architect liable to his employer, and such liability is in no way limited to the amount of the architect's fees. [See *Columbus Co.* v. *Clowes*, [1903] 1 K. B. 244.] Thus, for instance, if an architect were to certify payment for bad work, or certify for more money than was due to the builder, the architect's liability to the building owner would be exactly

the amount of damage which the building owner had sustained by the negligence of the architect (*Rogers* v. *James*, 1891, 8 T. L. R. 67; and more fully at p. 113, vol. ii. Hudson on *Building Contracts;* and see BUILDING CONTRACTS). This liability of the architect arises on the implied undertaking, which any person exercising a profession makes, that he is competent to exercise, and that he will exercise, due skill and care in the performance of the duties which he has taken upon himself to perform. [But where the architect ascertained the amount due to a contractor, and certified for it under the contract, he was held to occupy the position of an arbitrator, and therefore not liable to an action by the building owner for negligence (*Chambers* v. *Goldthorpe*, [1901] 1 K. B. 624).]

The architect, however, is in no way liable to the builder unless he is employed by him, or unless the architect has prevented the builder from performing his contract, as, for instance, by unfair or dishonest condemnation of materials, or by unfairly or dishonestly refusing to certify moneys due to the builder.

In almost all building contracts the architect, besides being the agent of the building owner, is placed in a quasi-judicial position, in which he has to decide as to the quality of materials and work, the amount due to the builder, and other incidental matters, and sometimes he is made the arbitrator between the parties. In the performance of these services he has only one duty, and that is to act fairly and honestly; and if he so acts, he is under no liability to anyone in so far as he is acting in a quasi-judicial position or as arbitrator; but though he cannot be sued in that capacity, yet he may be sued as architect, for any negligence in his profession, by the person who has employed him (see *Rogers* v. *James*, before cited).

[The final certificate of an architect is not always conclusive as between contractor and owner, and does not bar the latter's claim for damages in case of alleged defective work and the supply of improper materials under the contract (*Robins* v. *Goddard*, [1905] 1 K. B. 294).]

The authority of architects is generally defined by the building contract, and if they exceed their authority they may become liable to the builder or the building owner. Thus, in the ordering of additional work, if the architect has no authority conferred upon him by the terms of the contract, and no express or implied authority apart from the contract to order extras, he would, if he ordered additional work for which the building owner refused to pay, render himself liable to the builder for damages in an action for breach of warranty of authority, and for any expenses which the latter has reasonably incurred in suing the building owner. On the other hand, if the building owner were obliged by the terms of the building contract to pay the builder for this additional work, which he had never authorised, he could sue the architect for damages for having exceeded his authority.

The charges of architects have been the subject of much legal discussion, but the result of the cases is that architects are only entitled to recover reasonable charges. The Royal Institute of British Architects have, however, fixed a scale of charges, which, though it may bind the members of that body, cannot bind the general public, unless the building owner has agreed to pay the architect upon such scale.

Speaking roughly, 5 per cent. on the cost of the works is an architect's usual fee; but this fee might be quite inadequate where the cost of the work is small, or where a great amount of designing or superintendence is required. On the other hand, such a fee might be excessive, for instance, where the work consisted in the building of a block of several buildings all alike.

[The plans of a building, the architect's work on which have been paid for, do not belong to him, and any custom to the contrary will not prevail against a building owner who demands the plans (*Gibbon* v. *Pease*, [1905] 1 K. B. 810).]

The personal skill of the architect also is a matter for consideration in estimating whether the charges are reasonable or not.

In reference to the charges of architects, it must not be forgotten that a further charge is made for taking out quantities when an architect is instructed to get tenders, and this charge is also based upon a percentage on the cost of the work.

Quantities are generally prepared by a quantity surveyor, but sometimes by the architect himself. It often happens that the building owner is not informed as to this charge; and if a tender is accepted, nothing is heard of it by the building owner, because the percentage is added by the builder to his tender before he arrives at the sum total of his estimate. If, however, a tender is not accepted, the building owner finds that he is called upon to pay a sum varying from $1\frac{1}{4}$ to $2\frac{1}{2}$ per cent. on the cost of the work, either to the quantity surveyor or to the architect, for obtaining tenders which are useless. This practice causes many disputes which would be avoided if building owners were made acquainted with this charge in the first instance, before tenders are obtained.

The obligations of architects as to legal knowledge are not the same as those of a lawyer, and, to quote from Hudson on *Building Contracts*, 2nd ed., p. 54, "architects seem to be subject to the same rules as were laid down by Jervis, C.J., in speaking of ecclesiastical surveyors, that the surveyors 'could not be expected to supply minute and accurate knowledge of the law; but we think, under the circumstances, they might properly be required to know the general rules applicable to the valuation of ecclesiastical property' (*Jenkins* v. *Betham*, 1855, 15 C. B. 168; 24 L. J. C. P. 94)." Thus London architects ought to be sufficiently acquainted with the London Building Act, 1894, to prepare plans in accordance with its provisions, and to comply with its other requirements in relation to building work, and they must not neglect to consider the rights of adjoining owners. See Adjoining Owners.

There are many other qualifications which architects should possess, and the student will find these to some extent set out in the syllabus of subjects required for the examination to be passed preparatory to membership of the Royal Institute of British Architects. The Surveyors' Institute also hold examinations, and the subjects given by that body would indicate the necessary qualifications not only of surveyors, but of those who carry on the joint profession of "architects and surveyors."

The profession of a surveyor will be described under the head Surveyor; but when architects often practise as surveyors, and surveyors as architects, it is difficult to entirely separate one from the other.

Areas (Local Government).—See LOCAL GOVERNMENT.

Armistice (from Lat. *arma*, arms, and *sistere*, to stop).—A temporary cessation of hostilities by agreement between the belligerents. Its usual object is to consider overtures by one of the parties for the conclusion of peace. It thus differs from a "suspension of arms" or truce between two contending forces, for a local or military purpose only. In the French language the word applies to both: they are distinguished from each other as *general* or *partial* armistices. It follows from the above distinction that an armistice can only be concluded by the chief authority of State, or by a delegate of such authority possessing the necessary powers in that behalf.

Armorial Bearings (Armories, Armorial Ensigns, Coat of Arms, Coat Armour, *Insignia Gentilitia*).—Devices first adopted by wearers of close armour as marks of personal identity, and placed either on their arms, chiefly the shield, and other appurtenances of war, as banners, etc., or embroidered upon surcoats worn over the armour, and hence called "Coats of Arms."

In heraldry, as subsequently developed, armorial ensigns consist—(1) of the shield on which the devices are represented; (2) of numerous external appendages, such as the crest—which is distinct from, though frequently similar to, one of the bearings of the shield—over an heraldic wreath which is an essential part of it, the rule being, No wreath no crest; the motto, supporters, helmet, coronet, etc.

Many devices resembling those of heraldry have been found in almost all nations, but heraldry proper begins with the European feudal system; and there is no evidence that, even in Europe itself, hereditary arms were borne before the twelfth century, except by a few royal, or almost royal, families (Hallam, *Middle Ages*, p. 206, note). But there is something to be said for an earlier recognition of this hereditary character (Ellis, *Antiquities of Heraldry*). The *Leges Hastiludiales* of Henry the Fowler, of the date 938, contain not only specific directions regulating the use of *insignia gentilitia*, and of their registration by the heralds, but treat them as the exclusive privilege of the nobly born, and exclude from participation in the tournaments all whose ancestors had not borne them for at least four generations (Woodward and Burnett's *Heraldry*, vol. i. p. 27, *s.v.* "Nobility").

But whether of earlier or later origin, the use of armorial ensigns, as denoting nobility of blood, when the actual possession of a military fief did not of itself announce it, was thoroughly established at the commencement of the thirteenth century, and the science, or art, of heraldry, as generally understood, was employed in representing, by devices, constructed according to technical rules, persons, their families and properties, their pretensions to honours or estates, their alliances and feudal tenures.

By this time, too, persons so using arms were recognised as having acquired an exclusive right to use them, and to transmit them to their descendants.

In 1419, Henry v. issued a proclamation forbidding all persons who had not borne arms at Agincourt, to assume them, except in virtue of inheritance, or of a grant from the Crown. [In the fourteenth and

fifteenth centuries arms, or parts of arms, were often assigned by a grantor who was a stranger in blood to the grantee, and down to the present day there are countless instances of "name and arms" clauses in wills and settlements, and custom seems to require the permission of the Crown, and fees to the Heralds' Office, and law stamp duties, before legitimate assumption on the part of grantee or devisee.]

Lord Coke, commenting on Littleton's statement (27*a*, s. 31), that a gift of lands or tenements to a man, and his heirs male or female, confers an estate in fee-simple, says: "This rule extendeth not to the inheritance that noblemen and gentlemen have in their armories or arms. For where he hath a fee-simple in them yet is the same descendible to the heirs males lineall or collaterall.

"For albeit a female be heire at the common law, yet the shield, armories, and arms descend unto them that are able to beare them. And all the females of that family, in respect that they be of the same blood, may, in a lozenge, or under a curtaine, manifest of what family they be, by expressing the armories and arms belonging to that family, and the husbands of them may impale or quarter them with their own, as the case shall require."

At sec. 210, 140*b*, he compares this descent to that of gavelkind lands, and continues: "Which armes do not descend to all the bretheren alone, but to all their posterity. But yet, *jure primo-genituræ*, the eldest shall bear, as a badge of his birthright, his father's armes without any difference, for that he is more worthy of blood; but all the younger bretheren shall give severall differences—*et additio probat minoritatem.*"

The Court of Chivalry continued to adjust all matters relating to armorial ensigns, and other matters relating to deeds of arms, or war, outside the cognisance of the common law, until Richard III. incorporated the College of Arms, or Heralds' College (see HERALDS), for this purpose. No statutes, or cases in the Civil Courts, are to be found dealing with any of the questions with which the Court of Chivalry, or the College, were concerned. Neither had they the power of imposing penalties or imprisoning for a breach of the heraldic laws of arms. So that, as in the cognate case of the assumption of surnames (*q.v.*), armorial bearings may be assumed by anyone at pleasure, and they may be either brand new ones, unrecognised at the College of Arms, or those that have been borne by a family for centuries. The "right to bear arms" is now a phrase of little meaning when a new grant is applied for at the College; and, if made, it carries with it no proof of pedigree, or otherwise, receivable as evidence in the Courts. But armorial bearings used before the Revolution of 1688, especially those recorded in the *Minutes of the Heralds' Visitations* [though modern antiquarian research shows these to have been carried out frequently in a perfunctory and incomplete manner], the last of which was in 1686, and the first in 1528, are admissible in pedigree cases (Taylor, *Evidence*, 10th ed., vol. i. s. 657).

A voluntary assumption of arms, however, by a person directed under the "name and arms" clause of a settlement, or will, to obtain the royal licence and a grant, would probably not be sufficient, but if every endeavour has been made to carry out the directions, the estate would not be divested by the failure (*Austen* v. *Collins*, 1886, 54 L. T. 903; *In re Drax; Baroness Dunsany* v. *Sawbridge*, 1906, 22 Times L. R. 343).

The exemplification of a grant of arms made by the College is "a sort of family document in which every member of the family is interested, and whoever has possession of it is entitled to it, but may be called on to produce it" (*Stubs* v. *Stubs*, 1862, 31 L. J. Ex. 510).

The stamp duty on the licence of the Crown to take and use arms, in compliance with the injunctions of any will or settlement, is £50; or, upon a voluntary application, £10; and on a grant of arms or armorial ensigns by the Crown, or the College, £10.

By the Customs and Inland Revenue Act, 1869, 32 & 33 Vict. c. 14, s. 18, an annual licence must be taken out, and a duty of two guineas paid, for armorial bearings displayed on any carriage; and one guinea if displayed or worn otherwise, under a penalty of £20; but this licence is not considered by the custom of heraldry as conferring any legitimate right to bear arms (s. 19); and any kind of emblem is included in the term "armorial bearings."

Proprietors of public carriages, licensed by local authorities, are exempt (s. 28).

The Commissioners of Inland Revenue do not require to take out licences—(1) Shopkeepers who use devices solely as trade-marks; (2) Corporations, or public companies, or any person using the corporate arms by right of office; (3) Officers or members of a club or society using thereat, or on its business, any armorial bearings, if the club or society has taken out a licence.

By sec. 20 of the Local Government Act, 1888, 51 & 52 Vict. c. 41, this tax, with others set out in Schedule I., and all fines and penalties incurred in relation to it, are to be handed over by the Exchequer to the County Councils; and, by order of His Majesty in Council, the powers and duties of the Commissioners of Inland Revenue, and other officers, may be transferred to the County Councils and their officers.

The Trade Marks Act, 1905, 5 Edw. VII. c. 15, s. 68, prohibits, under a penalty of £20, the assumption of the royal arms in any trade, business, calling, or profession, without the authority of His Majesty, or any of the royal family, or of any Government department.

[The custom, or as some wrongly term it, the law, of heraldry has of recent years excited greater interest, and has been a matter for considerable discussion in the pages of antiquarian reviews. See Phillimore on "Grants of Arms," and Oswald Barron on "The Genuinely Armigerous Person," in the *Ancestor*, No. vi. (July 1903) p. 155.]

Armour, Arms.—The Bill of Rights, 1 Will. & Mary, c. 2, s. 2, confers upon all subjects the right of carrying arms for defence, suitable to their condition and degree, and allowed by law. 2 Edw. III. c. 3, prohibits persons from going armed under circumstances which may tend to terrify the people or indicate an intention of disturbing the public peace. In *R.* v. *Meade*, 1903, 19 Times L. R. 540, a conviction was obtained under this Act, and see 3 Co. Inst. 160. The training of persons, without lawful authority, to the use of arms, is prohibited by 60 Geo. III. c. 1; and justices of the peace are authorised to disperse any assembly of persons found so employed. The Act 33 & 34 Vict. c. 57, imposes a penalty on persons using or carrying a gun elsewhere than in a dwelling-house or the curtilage thereof, without a licence, the duty on which is ten shillings. See ARMORIAL BEARINGS.

Arms, Offences with.—See FIREARMS.

Arms of the Sea.—See FORESHORE.

Army.—Before the Civil War of the seventeenth century there was no regular standing army in England; the constant endeavours of the Crown to establish a body of men subject to military law, both in peace and war, and liable to serve either abroad or at home, having always met with opposition from Parliament and the nation.

By the Bill of Rights (1 Will. & Mary, sess. 2, c. 2) the principle that the Crown could not raise or keep a standing army, in time of peace, without the consent of Parliament, was definitely established.

From the War of the Spanish Succession in 1702, England became constantly more involved in European politics, and the army grew into a regular and popular profession; but the existence of a permanent military force was never recognised by any statute. Since 1689 merely annual Acts, known as Mutiny Acts, or, since 1881, as Army Acts, have been passed, limiting the number of the forces which the Crown might raise and maintain for the current year.

Prior to this acquiescence of Parliament in the existence of a standing army there were two kinds of military forces in the hands of the Crown. Firstly, the feudal array, which was liable, though under inconvenient limitations, to serve abroad as well as at home, and soon became unequal to the demands of the kings upon it. The French wars of Edward III. and Henry IV. were carried on by men recruited by contract with men of rank, who engaged to procure voluntary enlistments.

Under the Tudors and Stuarts the prerogative of pressing men was established by usage, and sanctioned by an Act of Philip and Mary. It was declared illegal by 16 Car. I. c. 28, which also provided that service should not be compulsory out of the country, unless founded on tenure.

By the Statute 12 Car. II. c. 24, 1661, the feudal tenures were abolished.

The other force was that of the militia; strictly domestic and defensive. By Statutes of Henry II. and Edward I. the defence of the counties was entrusted to the Sheriff, with enlarged powers, as the head of the county forces; and provisions were made for each adult furnishing arms according to his estate. In the reign of Mary the Sheriff was replaced by the Lord-Lieutenant of the county.

At the Restoration this militia was declared by 13 Car. II. c. 6, with all other forces by sea and land, to be under the sole government and command of the king, and it was then, and has since several times been, reorganised, and now forms part of the auxiliary forces of the Crown. See [Militia and Yeomanry Act, 1902, 2 Ed. VII. c. 39] MILITIA; YEOMANRY; VOLUNTEERS.

Moreover, during this reign and that of James II., parliamentary sanction was given for keeping on foot the Guard to the Sovereign, which had indeed long been lawful, and for the maintenance of certain garrisons essential for the public safety. Under the title of "Guards and Garrisons," the home army was annually voted by Parliament till the beginning of this century; and the Guards have since been continued on the army establishment (Clode's *Military and Martial Law*, p. 5).

But in both reigns unauthorised additions were made, and Articles of War (see WAR) issued for the government and discipline of these troops, which were contrary to constitutional principle. On actual service troops had always been subject to such Articles, "for always, preparatory to an actual war, the kings of the realm, by advice of the constable or marshal, were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law" (Hale, *Hist. Com. Law*, 40).

The Mutiny Act, 1689, 1 Will. & Mary, c. 5, was the first expression of the closer co-operation of Parliament with the Crown, and was due to the threatened dangers to the new settlement of the kingdom. It recites the provisions of Magna Charta, that no man shall be punished, or judged, otherwise than by the established laws of the realm, but that it was requisite to retain such forces as should be raised in exact discipline, and enacts that every person in the army, as officer or soldier, found guilty by court-martial of mutiny, sedition or desertion, might be punished with death, or otherwise as such court-martial should direct.

To this extent only was the power of the Crown over the army increased; but by the Mutiny Acts of 1715 and subsequent years, express authority was given to the Crown, in very wide terms, to make Articles of War for the army both at home and abroad; and in 1803 the Mutiny Act, and Articles of War, made under the various statutes, were extended to the army both within and without the Crown's dominions (43 Geo. III. c. 20). In 1879 the provisions of the Mutiny Act and the Articles of War contained in the Army Discipline and Regulation Act of the same year (42 & 43 Vict. c. 33) were consolidated into a code of military law, which was repealed and re-enacted with amendments by the Army Act, 1881, 44 & 45 Vict. c. 58. This Army Act must be annually re-enacted by a separate Act similar to the old Mutiny Acts. This latter Act specifies the number of troops to be continued for the year, and makes any amendments necessary in the renewed Act. The Army Act and the King's Regulations and Army Orders, made in pursuance of various statutes [and published periodically], form the code of military law.

British officers and men serving in India are also subject to this Act. For the Indian and Colonial Forces, see titles—INDIAN ARMY; and COLONIAL FORCES.

The forces governed by this code are the regular and the auxiliary forces. The regular British forces are the army, provided for by the annual Army Discipline Act; the reserve forces, authorised by the Reserve Forces Act, 1882, 45 & 46 Vict. c. 48; and the Royal Marines, under the control of the Admiralty, but subject to the Army Act when not serving on board, and in other respects treated as soldiers. See ROYAL MARINES.

The auxiliary forces are the militia and the militia reserve, the yeomanry, and the volunteers (*q.v.*).

The men of the militia are subject to the code during their preliminary training, their annual training, when they are acting with the regular forces, and during embodiment; but the officers are subject to it at all times (Army Act, s. 176 (6)).

The yeomanry are subject to it during their annual training, when

acting with the regular troops or militia, or on active service, or when serving in aid of the civil power.

As to other persons subject to it, who may be treated as officers or soldiers, see s. 175 (7), (8), and s. 176.

But all these various classes of persons remain liable to the ordinary civil and military law (*Burdett* v. *Abbott*, 1812, 4 Taunt. 401; 12 R. R. 450), and have the same rights as civilians in respect of voting for and serving as members of Parliament (s. 144); and see also *Atkinson* v. *Collard*, 1885, 16 Q. B. D. 254, as to claims for votes in respect of occupation of military quarters.

There are, however, some necessary limitations of this rule whilst the soldier is in the service. He cannot change his domicile or settlement. His marriage is legal without the consent of the military authorities, but they will not provide for his family; and he is not chargeable with desertion, or neglecting to maintain, or leaving them chargeable to the union. There are, however, special provisions in the Army Act for deduction from pay for their maintenance, or for a bastard child (s. 145). [See AFFILIATION.] He cannot be arrested or compelled to appear before any Court for a civil debt, damages, or sum of money under £30; but the creditor may sue and have execution, so long as he does not touch the person, pay, or military equipment of the soldier (s. 144). An officer or soldier cannot legally assign, or charge, his pay or pension (s. 141). On actual military service, an officer or soldier may make a nuncupative will as to his personal estate [see MILITARY TESTAMENT]. Officers are exempt from licence duty for their soldier servants. The occupation of property by an officer, in respect of his office, is the occupation of the Crown, and he is not liable, therefore, for local rates. Officers and soldiers, when on duty, are exempt from tolls (s. 143). Officers of the army, militia, or yeomanry, while on full pay, are exempt from serving on juries—absolutely as to coroners' juries; but as to a grand or common jury, only if their names are not on the list; so that proper objection must be taken in time. A soldier is altogether exempt (s. 147). Officers on full or half-pay are also exempt from serving any municipal office, by the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 253; and from serving the office of overseer. But officers are not ineligible for membership of a County Council. They are prohibited by the King's Regulations from joining the directorate of any public or other company, without permission from the Commander-in-Chief.

By sec. 41, a person under military law may be tried by court-martial for treason, murder, manslaughter, rape, treason-felony, or any other offence punishable by the law of England; but, in the case of the crimes particularly specified, only if they are committed outside the United Kingdom, or if outside the United Kingdom and Gibraltar, but within His Majesty's dominions, at a place more than one hundred miles from any city or town where they can be tried by a competent Civil Court.

By sec. 95, aliens may be enlisted if His Majesty signify his consent through the Secretary of State; but in any corps there must not be more than one alien to every fifty British subjects; and an alien so enlisted cannot hold any higher rank than warrant-officer, or non-commissioned officer.

Recruits may purchase their discharge within three months of enlistment, on payment of £10 (s. 81). Apprentices under twenty-

one years may be claimed by their masters; subject to the provisions of s. 96.

As to persons under liability to billet soldiers, ss. 102-111.

As to impressment of carriages, ss. 112-121.

By secs. 125 and 126, witnesses at courts-martial have the same privileges as witnesses in Civil Courts. If a civilian refuses to give evidence, to take the oath or affirmation, to produce documents, on the president so certifying, he may be punished by a Civil Court as if for contempt of that Court; and so in the case of perjury.

A court-martial is governed by English law only, and the rules of evidence are the same as in the Civil Courts (ss. 127-128).

Counsel may appear at general and district courts-martial, and address the Court.

Excess of jurisdiction is restrained by the writs of prohibition, *certiorari*, or *habeas corpus* (*q.v.*); and members of a court-martial, or individual officers, are subject to actions for damages, and criminal proceedings, for injury caused to any person by acts done without jurisdiction, or in excess of jurisdiction. But a Court of law will not interfere if the injury done affects only a person's military character or position.

On the relation of Courts of law to courts-martial, see COURTS-MARTIAL.

[See *Manual of Military Law* (War Office, 1894); Anson, *Law and Custom of the Constitution*, pt. ii.; Dicey, *The Constitution:* and see BILLETING; COMMISSION; DESERTION; ENLISTMENT; FURLOUGH; IMPRESSMENT; Military Tramways Act, 1887, 50 & 51 Vict. c. 65; Military Lands Act, 1892, 55 & 56 Vict. c. 43.]

Arraignment is the bringing of a person (against whom an indictment or inquisition has been found) to account (*ad rationem*) before the Court which is appointed to try him. The accused is first called to the bar of the Court, and surrenders, or is brought in custody to the bar of the Court, or is placed in the dock. He must not be in fetters, unless it be made necessary by apprehended violence, or risk of rescue, or escape (Hawk., P. C., bk. ii. c. 28, s. 1; Arch. Cr. Pl., 23rd ed., 181). The indictment is read, or the charge stated to him, by the Clerk of the Court, and he is asked whether he is "guilty or not guilty." Before this question is answered, all legal exceptions or objections to the proceedings (*exceptiones præjudiciales*) are to be stated, by demurrer, motion to quash, or plea in abatement, or to the jurisdiction, or by plea in bar, *e.g.* of autrefois acquit, or convict, or pardon. See each of these headings. If none of these objections are taken, or all fail, the accused must plead to the indictment. If he fails or refuses to plead "guilty or not guilty," the Court proceeds to inquire—(1) whether he is mute of malice, or by the visitation of God, (2) whether he is able to plead and understand the course of his trial, or (3) whether he is insane; and a jury is sworn to determine one or all of these issues (see Arch. Cr. Pl., 23rd ed., 183). If he is found mute by the visitation of God, but sane, the Court directs entry of a plea of not guilty, if there is any prospect of making him understand the proceedings at the trial. If the accused is mute of malice, or will not plead directly to the indictment, a plea of not guilty is entered under 7 & 8 Geo. IV. c. 28, s. 2 (which supersedes but does not expressly repeal 12 Geo. III. c. 20). At common law, refusal

to plead in case of treason or misdemeanor was taken as equivalent to a plea of guilty, and in case of felony exposed the accused, until 1772 (12 Geo. III. c. 20), to the *peine forte et dure* made to enforce him to plead and consent to his trial *in pais* (Stephen, *Hist. Crim. Law*, i. 289; Pike, *History of Crime*, i. 218, 283; Pollock and Maitland, *Hist. Eng. Law*, ii. 648). If the jury find the accused to be insane, so as to be unfit to plead, the Court records the finding, and orders his detention as a criminal lunatic, to await the King's pleasure (39 & 40 Geo. III. c. 94, s. 2). See ASYLUMS; LUNACY.

The old formalities of raising the hand when pleading guilty or not guilty, and the election of the accused as to the mode of his trial "by God and my country," are now disused, and the pleading of the plea "not guilty," without more, entitles the accused to trial by jury, except where he has privilege of peerage (7 & 8 Geo. IV. c. 28, s. 1); see Arch. Cr. Pl., 23rd ed., 182, and PEERAGE. The plea of not guilty is recorded by the Clerk of the Court on the indictment, by writing the word "puts," which, when a complete record is made up, is expanded to a statement of the election of the accused to be tried *in pais*, and the acceptance of that mode of trial by the prosecution, known in law as the *similiter* (see Stephen, *Hist. Crim. Law*, i. 297, 298; 7 Geo. IV. c. 64, s. 21).

On a plea of not guilty, issue is now taken as joined, and the clerk proceeds to call and swear the jury. On a plea of guilty, the Court proceeds to judgment (see Arch. Cr. Pl., 23rd ed., 325).

Where the indictment contains a charge of a previous conviction, the charge must not be mentioned on arraignment, nor until after confession or conviction of the subsequent offence (7 & 8 Geo. IV. c. 28, s. 11; 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37; 34 & 35 Vict. c. 112, s. 9). If the previous conviction is mentioned to the petty jury before a verdict has been given on the charge for the subsequent offence, the conviction for the subsequent offence is bad (*Faulkner* v. *R.*, [1905] 2 K. B. 76), except in cases where the previous conviction is admitted under the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 1 (*f*). These rules do not apply to indictments for offences against sec. 7 of the Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112 (see *R.* v. *Penfold*, [1902] 1 K. B. 547).

Where indictments for treason or felony are tried in the King's Bench Division of the High Court, the same procedure is usually followed (see Crown Office Rules, 1886, r. 132); but in the case of an indictment or information for misdemeanor there tried, the pleading is done in the Crown Office, and the pleadings are opened, as in civil cases, without arraignment (Crown Office Rules, 1886, rr. 128-133).

Arrangement (Deeds of).—See CREDITORS' DEEDS.

Array.—See JURY.

Arrest is physical interference with the liberty of any person, to compel his attendance before a Court of justice, or to compel fulfilment of a legal obligation.

1. *In Civil Proceedings.*—(*a*) Arrest of persons on civil process is now obsolete, except in cases (i.) of disobedience to or contempt of a Court of civil jurisdiction, (ii.) of certain classes of debtors who refuse to pay their debts (32 & 33 Vict. c. 62; 33 & 34 Vict. c. 76), or against whom

bankruptcy proceedings have been commenced, and (iii.) the now rare use of the writ *ne exeat regno* (see BANKRUPTCY; CONTEMPT OF COURT; DEBTORS' ACT). (*b*) As to arrest of ships, see ARREST OF SHIP.

2. *In Criminal Proceedings.*—In criminal cases arrest may be effected in the case of any offence, whether indictable or summarily punishable, on the warrant under hand and seal of a justice, issued under the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, ss. 1, 2, 3, or the Summary Jurisdiction Act, 1848, 11 & 12 Vict. c. 43, s. 2, after a sworn information has been laid before him. Judges of the Supreme Court have the jurisdiction of justices for every county; and also, in exercise of their ordinary powers, can issue bench warrants (*q.v.*) for the arrest of any offender, including a person charged with criminal contempt of Court, or they may proceed by way of writ of attachment, a process employed chiefly in cases of contempt, or in Crown suits (Hawk., P. C., bk. ii. c. 22). Arrest on the parol authority of a judge or justice is not resorted to except in the case of contempt, in face of a Court of record, or riots, or affrays (2 Hale, P. C., 86; *R.* v. *Pinney*, 1831, 3 St. Tri. N. S. 11). The warrant or writ must specify the charge on which the person named is to be arrested, general warrants being void (*Entick* v. *Carrington*, 1765, St. Tri. 1029). Writs of attachment are directed either to the sheriff or to an officer of the Court; other warrants, either to a particular named person, who need not be a constable, or generally to all police officers for the county or borough, for which the Court or justice is sitting, or has jurisdiction (11 & 12 Vict. c. 42, s. 10; c. 43, s. 3).

The person intrusted with the warrant can only execute the warrant within the county or borough for which it is issued, or, in the case of fresh pursuit, within seven miles of the border, measured as the crow flies (11 & 12 Vict. c. 42, s. 10; c. 43, s. 3; 52 & 53 Vict. c. 63, s. 34). But a metropolitan police officer may execute anywhere a warrant issued by a metropolitan police magistrate (2 & 3 Vict. c. 71, s. 17); and borough police may execute a warrant issued by a borough justice, in the county of which the borough is part, or anywhere within seven miles of the borough (45 & 46 Vict. c. 50, s. 223); and the police of Northumberland and Cumberland can execute English warrants in the border counties of Scotland (20 & 21 Vict. c. 72, s. 11). Outside the county of issue (with the exceptions above stated) the warrant of a justice must be "backed," *i.e.* indorsed by a justice of the county, before it can legally be executed (11 & 12 Vict. c. 42, s. 11; *R.* v. *Cumpton*, 1880, 5 Q. B. D. 341), and the same rule applies as to the execution in England and Wales of warrants issued in any other part of the British Islands (11 & 12 Vict. c. 42, ss. 12, 13, 15; c. 43, s. 3; 44 & 45 Vict. c. 24, s. 4). As to the arrest of fugitive offenders from other parts of the empire and foreign countries, see EXTRADITION; FUGITIVE OFFENDER. A warrant of arrest for an indictable offence may be issued or executed on Sunday (11 & 12 Vict. c. 42, s. 4; 29 Chas. II. c. 7, s. 6). A warrant remains in force till executed or discharged by order of a Court (Hawk., P. C., bk. ii. c. 13, s. 27). Outer and inner doors may be broken open to effect arrest under warrant, after demand and refusal of admittance (Hawk., P. C., bk. ii. c. 14; Fost., 2nd ed., 320). A warrant of arrest is usually executed by showing the warrant or reading the charge to the person to be arrested, and laying hands on him, and taking him in custody to a police station, till he can be brought before a justice,

or by taking him straight before a justice. In felony cases, an officer who has not the warrant, but knows of its issue, may arrest without it (*Creagh* v. *Gamble*, 1890, 24 L. R. Ir. 458). In cases of misdemeanor, it is essential that the officer should have the warrant in his possession (*Codd* v. *Cabe*, 1876, 1 Ex. D. 352). The prisoner must not be treated with indignity or be handcuffed, unless there is risk of rescue or escape (*Wright* v. *Court*, 1825, 4 Barn. & Cress. 596; 28 R. R. 418). The guilt or innocence of the person does not affect the legality of the arrest, so far as the officer is concerned, provided that the warrant purports to be for an offence over which the person issuing it has jurisdiction (Hawk., P. C., bk. ii. c. 13, ss. 10, 11; *Henderson* v. *Preston*, 1888, 21 Q. B. D. 362); nor is the validity of a warrant affected by the death, before the arrest, of the justice who issued it (42 & 43 Vict. c. 49, s. 37).

Arrest without Warrant by any Person.—Any person may at common law arrest, without warrant, anyone who in his presence commits a felony, or gives a dangerous wound, or whom he reasonably suspects of having committed a felony, if a felony has in fact been committed (*Beckwith* v. *Filby*, 1827, 6 Barn. & Cress. 635; *Allen* v. *L. S. W. R.*, 1871, 6 Q. B. D. 65). This right flows from the obligation, still preserved by the Sheriffs Act, 1887, 50 & 51 Vict. c. 55, s. 8, to be ready to pursue felons at the call of the sheriff and cry of the county. In case of a breach of the peace or affray actually going on in his presence, he may stop it, and arrest the offenders and hand them to a constable (*Timothy* v. *Simpson*, 1834, 1 C. M. & R. 757, 762; 40 R. R. 722; approved in *Price* v. *Seeley*, 1843, 10 Cl. & F. 28; 8 E. R. 651). He is also by statute allowed to arrest anyone whom he finds committing an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11); any offence against the Larceny Act, 1861, except angling in the day time (24 & 25 Vict. c. 96, s. 103); or against the Coinage Offences Act, 1871, 24 & 25 Vict. 99, s. 31; or against the Vagrancy Act, 1824, 5 Geo. IV. c. 83, s. 6, and its extensions and amendments; and is required to arrest rioters not dispersing after the Riot Act has been read (1 Geo. I. st. 2, c. 5, s. 3; *R.* v. *Pinney*, 1831, 3 St. Tri. N. S. 11). Persons found committing any offence against the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97, s. 61, may be arrested without warrant by the owner of the property damaged, or his servants or persons authorised by him.

A person found committing an offence against the Towns Police Clauses Act, 1847, 10 & 11 Vict. c. 89, s. 13, or the Metropolitan Police Act, 1839, 2 & 3 Vict. c. 45, s. 16, may be arrested without warrant by the owner of the property on or with regard to which the offence was committed, or by his servants or persons authorised by him. And similar provisions are made by the Night Poaching Act, 1828, 9 Geo. IV. c. 69, s. 2, and the Salmon Fisheries Acts, 36 & 37 Vict. c. 71, s. 38; 41 & 42 Vict. c. 39, s. 8. The words "found committing" are, it would seem, to be taken literally, *i.e.* as applying to detection in actual commission of the offence, and immediate pursuit (see *Griffiths* v. *Taylor*, 1877, 2 C. P. D. 194; *Downing* v. *Capel*, 1867, L. R. 2 C. P. 461). These decisions were given in cases where the defence —now abolished by 56 & 57 Vict. c. 61—of "not guilty" by statute was pleaded.

Arrest without Warrant by Constables.—A peace officer may, as such,

at common law, arrest without warrant—(1) Any person whom he suspects on reasonable grounds of having committed a felony, whether a felony has in fact been committed or not (*Marsh* v. *Loader*, 1850, 14 C. B. N. S. 535); (2) Any person committing a breach of the peace in his presence, at the time of or immediately after the offence (*R.* v. *Light*, 1857, 27 L. M. J. C. 1). He may also by statute arrest, without warrant, any person whom he finds lying or loitering in any highway, road or other place during the night, whom he has good cause to suspect of having committed or of being about to commit any felony against the Larceny, Malicious Damage, or Offences against the Person Acts of 1861, 24 & 25 Vict. c. 96, s. 104; c. 97, s. 57; c. 100, s. 66; and ticket-of-leave men whom he suspects of committing any offence (54 & 55 Vict. c. 69, s. 2). Under other Acts he has like powers in the case of offences in streets or highways (5 & 6 Will. IV. c. 50, ss. 58, 59; 10 & 11 Vict. c. 89, s. 28; 2 & 3 Vict. c. 47, s. 54); disorderly persons or loiterers at night (10 Geo. IV. c. 44, s. 7; 2 & 3 Vict. c. 47, s. 64; 45 & 46 Vict. c. 50, s. 193); and offenders in the Metropolitan Police district who refuse their names and addresses (2 & 3 Vict. c. 47, s. 63); persons profanely swearing in his presence, if unknown (19 Geo. II. c. 21, s. 3); and see also the Indecent Advertisements Act, 1889, 52 & 53 Vict. c. 18, s. 6; the Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15, s. 4; and the Prevention of Cruelty to Animals Act, 1849, 12 & 13 Vict. c. 92, s. 13. A person arrested without warrant may not be detained in private custody, but must be taken with all convenient speed to a police station or before a justice, and charged formally with the offence (42 & 43 Vict. c. 49, s. 38). The extent of the right to break open doors to arrest without warrant is doubtful (2 Hale, P. C., 94; 1 East, P. C., 322; Fost. Cr. L. 322; *Harvey* v. *Harvey*, 1884, 26 Ch. D. 644; Stone, *Justices' Manual*, 38th ed., tit. "Arrest"). And see BAIL.

Privilege.—A person concerned with business in a Court of law is privileged *eundo morando et redeundo* from arrest on civil process, but not from arrest on a criminal charge (*Re Freston*, 1883, 11 Q. B. D. 545), except perhaps in the case of a witness (see 3 Russ. on *Crimes*, 6th ed., 1641).

Resistance and Flight.—Resistance to legal arrest is unlawful (see 3 Russ. on *Crimes*, 6th ed., 70-120, and ASSAULT), and if it leads to death or serious injury, indictable; and where the person resisting arrest is found committing an indictable offence in the night, he is punishable under 14 & 15 Vict. c. 19, s. 12. Resistance to the sheriff in the execution of a writ is a misdemeanor, and the sheriff may arrest the offender without warrant (50 & 51 Vict. c. 55, s. 8 (2)). No more force than is absolutely necessary may be used by any person acting on behalf of justice, even in a case of resistance. The killing or wounding of a fugitive offender is not justifiable, except when his offence is capital and his flight cannot be otherwise stayed (*R.* v. *Dodson*, 1851, 2 Den. Cr. C. 35; 20 L. J. M. C. 57; 3 Russ. on *Crimes*, 6th ed., 175; Arch. Cr. Pl., 23rd ed., 812). Illegality in the warrant or mode of arrest does not affect the right of the Court to try the prisoner when brought before it (*R.* v. *Hughes*, 1879, 4 Q. B. D. 614), unless some element essential to create jurisdiction has been omitted (*Dixon* v. *Wells*, 1890, 25 Q. B. D. 249).

Arrest of Ship.—This is the method of enforcing the Admir-

alty process *in rem*, whether that process be founded on a maritime lien or on a claim against the ship. In the former case, arrest is allowed, even though the property may have changed hands since the cause of action arose, for "the maritime lien arises from the moment of the circumstances creating it, and not from the date of the intervention of the Court" (*The Pacific*, 1864, Br. & Lush. 243; Dr. Lushington, approved by Fry, L.J., in *The Heinrich Bjorn*, 1885, 10 P. D. 58). In the latter case, arrest is not allowed unless the ship continues in the same hands as at the time when the claim arose.

Process of Arrest.—Arrest is effected under the authority of a warrant issued from the Admiralty registry, after a notice or *præcipe* praying for a warrant, together with an *affidavit to lead* warrant, stating the cause of action, has been filed there. The warrant is directed to the marshal of the Admiralty Division, commanding him or his substitutes to arrest the ship and keep her under safe arrest till further order of the Court. It must be served by the marshal or his substitutes within the jurisdiction, and within a year from the day of its date. The manner of serving it on a vessel is to nail or fix the original warrant for a short time on the main-mast or single mast of the vessel, and then leave a copy in its place.

Extent of Arrest.—An arrest of ship extends to the sails or rigging taken on shore for safe custody, and similar appurtenances of the ship (*The Alexander*, 1812, 1 Dod. 282; *The Dundee*, 1823, 1 Hag. Adm. 124); and also to an increase in value of the ship, owing to repairs being done by the owner at his own expense after the lien attached, but not if these are done by a stranger on the security of a bottomry bond (*The Aline*, 1839, 1 Rob. W. 120). But it will not attach to personal luggage of passengers or the effects of seamen (*The Willem III.*, 1871, L. R. 3 Ad. & Ec. 487). If the cargo is on board, and is proceeded against, either on its own account (as in case of salvage), whether it be named in the warrant or not, or on account of the freight due in respect of it, the arrest of the ship is also an arrest of the cargo and freight (*The Flora*, 1866, L. R. 1 Ad. & Ec. 45), and by freight is meant all freight actually accrued, *i.e.* the gross freight, less proper deductions as agreed by charter (*The Leo*, 1862, Lush. 444). If the cargo has been landed or transhipped, an arrest of ship is not an arrest of cargo, but the cargo must be arrested similarly to the ship, viz., placing the warrant on it for a short time and then leaving a copy in its place. Where it is in custody of any person, the original warrant is shown to him, and a copy left. When the proceeds of the cargo are in Court, the warrant must be served on the Admiralty registrar.

Effect of Arrest.—The arrest binds the whole of the property, whatever its value, to the amount of the claim. After arrest the ship remains in the custody of the marshal, who is responsible for her safety; and anyone interfering with arrested property, without authority from the Court, is liable to attachment (*The Westmoreland*, 1845, 6 N. C. 173). The property arrested, unless bailed, remains under arrest till the action is determined. Property already under arrest can be arrested by a second plaintiff in the same way as by the first; or he can enter a *caveat* in the Admiralty registry against the release of the property. The owner of property about to be arrested, after giving an undertaking to appear in the action, and give bail or pay money into Court, can get a *caveat* entered against the issue of a warrant of arrest. This does not

prevent the property being arrested, but it renders the plaintiff who makes the arrest liable to satisfy the Court that he had good reason for doing so, or his warrant may be discharged, and he may be liable in costs and damages. A defendant who counterclaims against the plaintiff, in respect of a matter for which he could, before the Judicature Act, 1873, have brought an action *in rem* against the plaintiff's property, may arrest the plaintiff's property if he can, after appearing to the plaintiff's action (*The Julia Fisher*, 1876, 2 P. D. 115). An action may be maintained for damages for a wrongful arrest of a ship without proof of actual damage in Admiralty, and also, it seems, at common law, if that wrongful arrest is due to *mala fides* or *crassa negligentia* implying malice (*The Walter D. Wallet*, [1893] P. 202; Jeune, P., quoting the early authorities). It is a contempt of Court to move a ship under arrest (*The Victor Pretot*, 1898, 14 T. L. R. 244; and a ship should not be re-arrested without an order of the Court (*The Village Belle*, 1896, 12 T. L. R. 630).

Re-arrest.—When a ship has been released on bail, that bail is a substitute for her, and is "a security, not for the amount of the claim, but for the value of the property arrested, to the extent of the claim, and costs" (Williams and Bruce, 291). After bail is accepted, if it be inadequate, the ship can, it seems, be re-arrested at any time up to final judgment being given in the cause (which means final judgment after an appeal), and perhaps after that in some cases (*The Dictator*, [1892] P. 321; *The Flora*, 1865, L. R. 1 Ad. & E. 45); and certainly after final judgment for costs, if the bail is not enough to cover them as well as the damages (*The Freedom*, 1868, L. R. 3 Ad. & E. 495). See BAIL (ADMIRALTY). And in a case where bail was given for the full value of the ship, but judgment was given against her for a larger sum, it was held that, on coming again within the jurisdiction, she could be taken in execution for the balance of the liability (*The Gemma*, [1899] P. 285; but see Williams and Bruce, 24).

King's ships, and ships belonging to foreign sovereign governments, and used in their public service, are exempt from arrest (*The Charkieh*, 1873, L. R. 4 Ad. & Ec. 49 and 96; *The Constitution*, 1879, 4 P. D. 39; *The Parlement Belge*, 1880, 5 P. D. 197); as are also mail ships fulfilling the conditions of the Mail Ships Act and Rules, 1891 and 1892. Special power is given by statute to the judge of any Court of record in the United Kingdom to order the arrest of any foreign ship found within the territorial waters of the United Kingdom which has occasioned damage to any property of the Crown or of a British subject (Merchant Shipping Act, 1894, ss. 688, 692-3), or of any ship which by any defect in it or its apparel or equipment, or whose owners, master, or crew, or other person in the employment of such owners, has caused personal, including fatal, injury in any port or harbour of the United Kingdom to any person (Shipowners' Negligence Remedies Act, 1905, 3 Edw. VII. c. 10); and a receiver of wrecks may detain salved vessels and their cargo and apparel and wrecks till payment has been made for salvage, or process has been issued by a competent Court for its arrest or detention (Merchant Shipping Act, 1894, s. 552; *The Fulham*, [1898] P. 206; [1899] P. 251).

[See Williams and Bruce, *Admiralty Practice*, 3rd ed., 1902; Roscoe, *Admiralty Practice*, 3rd ed., 1903. For Forms, see p. 518.]

FORMS.

1. *Affidavit to lead Warrant in a Cause of Restraint* (*Order* 5, *r.* 16).

19 . [*Here put the letter and number.*]

In the High Court of Justice.

Probate, Divorce, and Admiralty Division.

Between A. B., Plaintiff,

and

The owners of the .

I, A. B., make oath and say as follows :—

1. I am the lawful owner of [*state number*] sixty-fourth shares of the or vessel belonging to the port of ; and the value of my said shares amounts to the sum of pounds or thereabouts.

2. The said vessel is now lying at , and is in the possession or under the control of , the owner of [*state number*] sixty-fourth shares thereof, and is about to be despatched by him on a voyage to against my consent.

3. I am desirous that the said vessel be restrained from proceeding to sea, until security be given to the extent of my interest therein for her safe return to the said port of [*the port to which the vessel belongs*], and the aid and process of the High Court of Justice are necessary in that behalf.

Sworn, &c.

2. *Affidavit to lead Warrant in a Cause of Possession* (*Order* 5, *r.* 16).

[*Heading as in Form* 1.]

I, A. B., make oath and say as folllows :—

1. I am the lawful owner of [*state number*] sixty-fourth shares of the or vessel , belonging to the port of .

2. The said vessel is now lying at , and is in the possession or under the control of [*state name, address, and description of the person retaining possession, and state whether he is the master or part owner, and, if owner, of how many shares*] ; and the said refuses to deliver up the same to me ; [and the certificate of registry of the said vessel is also unlawfully withheld from me by the said , who is in possession thereof].

3. The aid and process of the High Court of Justice are necessary to enable me to obtain possession of the said vessel [and of the certificate of registry].

Sworn, &c., before me, C. D., &c.

3. *Præcipe for Warrant* (*Order* 9, *r.* 11).

[*Heading as in Form* 1.]

I, A. B., solicitor for the plaintiff, pray a warrant to arrest [*state name and nature of property*].

Dated the day of , 19 .

[*To be signed by the solicitor, or by his clerk for him.*]

4. *Warrant of Arrest in Admiralty Action in rem* (*Order* 5, *r.* 16).

[*Heading as in Form* 1.]

EDWARD THE SEVENTH, by the grace of God, &c. [*as in Form No.* 1].

To the Marshal of the Probate, Divorce, and Admiralty Division of Our High Court of Justice, and to all and singular his substitutes [*or* To the Collector or Collectors of Customs at the Port of]. We hereby command you to arrest the ship or vessel of the port of [*and the cargo and freight, &c., as the case may be*], and to keep the same under safe arrest, until you shall receive further orders from Us.

Witness, &c.

5. *Instructions for the Arrest of Ship, Cargo, and Freight.*

IT is requested that the Warrant lodged herewith be executed by the arrest of the vessel lying , and of the cargo now or lately laden therein, together with the freight due for the transportation thereof, and of the cargo lately discharged therefrom and now lying at , together with the freight for the transportation thereof [*or as the case may be*].

Dated this day of 19 .

[*To be signed by the solicitor, or by his clerk for him.*]

It is also requested that instructions be forwarded by telegram to the marshal's substitute at [*if the property is at an outport, and immediate detention is required, this form must also be filled up*], desiring that an immediate arrest be effected of the said vessel and of the cargo now or lately laden therein, together with the freight due for the transportation thereof, in anticipation of the arrival of the warrant, an undertaking being hereby given that the marshal shall be indemnified in respect of all charges and expenses that may be incurred in consequence of such instructions.

Dated this day of 19 .

[*To be signed by the solicitor, or by his clerk for him.*]

Arsenal.—1. Under the Dockyards, &c., Protection Act, 1772 (12 Geo. III. c. 24), it is felony, punishable by death, subject to a power of recording the sentence (under 4 Geo. IV. c. 48), to burn or otherwise destroy any royal arsenal or magazine, or any military or naval stores therein, or any place in which any such stores are kept, in the United Kingdom, or any island, country, fort, or place thereunto belonging. The offence may be tried anywhere in the United Kingdom, or wherever the Crown deem most expedient in the interests of justice.

2. Under the Official Secrets Act, 1889, 52 & 53 Vict. c. 52, disclosure of official information as to a royal arsenal, or making drawings of it, without authority by or on behalf of His Majesty, is a misdemeanor, wherever committed in the British Empire, or by a British officer or subject outside it.

Arson.—1. Arson at common law was the burning of the house of another wilfully and of malice aforethought (*ædes alienas voluntarie et ex malitiâ præcogitatâ comburere*). It was a felony, punishable by death (Stephen, *Hist. Crim. Law*, i. 476), and the first offence as to which the law took special notice of the question of *mens rea* or criminal intent (Pollock and Maitland, *Hist. Eng. Law*, ii. 490; Stephen, *Hist. Crim. Law*, iii. 188; 3 Co. Inst. 66; Hawk., P. C., bk. i. c. 39).

2. To burn one's own house was a misdemeanor at common law, if damage was thereby caused to other houses (Hawk., P. C., bk. i. c. 39, s. 15).

Incendiarism is now regulated almost wholly by the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97.

3. It is felony, still punishable by death, wilfully and maliciously to set fire to any ship, dockyard, or arsenal belonging to the Crown, or to any materials therein (12 Geo. III. c. 24, s. 1; 7 & 8 Geo. IV., c. 28, ss. 6, 7) in any part of the King's dominions. The sentence of death may be recorded (4 Geo. IV. c. 48). The offence is also capital, and triable by court-martial, when committed by a person subject to naval discipline (29 & 30 Vict. c. 119, s. 34). See ARSENAL; COURTS-MARTIAL.

4. It is felony punishable by penal servitude for life, or not less than three years, unlawfully and maliciously to set fire to (*a*) a place of divine worship (24 & 25 Vict. c. 97, s. 1); (*b*) a dwelling-house if any person, even the incendiary, is then therein (s. 2, *R.* v. *Pardoe*, 1894, 17 Cox C. C. 715); (*c*) buildings belonging to railways, ports, docks, or harbours, or any navigation (s. 4); (*d*) buildings belonging to the Crown, any local authority, university, or college thereof, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription (s. 5); (*e*) crops, cut or standing, of any cultivated vegetable produce, and growing woods, plantations, heath, gorse, or fern (s. 16); (*f*) stacks of any cultivated vegetable produce, or of wood, bark, coal, charcoal, heath, gorse, fern, or peat (s. 17, *R.* v. *Satchwell*, 1872, L. R. 2 C. C. R. 21); (*g*) coal mines (s. 26); or (*h*) ships or vessels, whether with or without intent to prejudice owners, shippers or underwriters (ss. 42, 43).

5. It is felony punishable by penal servitude for life, or not less than three years, unlawfully and maliciously to set fire (*a*) to any building used for domestic, manufacturing, commercial, or agricultural purposes (whether it be the property or in the possession of the accused or of another), with intent to injure or defraud any person, whether the owner of the property or not (ss. 2, 58, 59, 60; *R.* v. *Newboult*, 1872, L. R. 1 C. C. R. 344); or (*b*) to any vessel, with intent to injure or defraud the owner, or any part owner of the vessel, or of any goods on board, or of persons who have insured vessel, freight, or goods (s. 43).

6. It is also felony, punishable by penal servitude from three to fourteen years, unlawfully and maliciously to set fire (*a*) to any building not enumerated above (s. 6), including an unfurnished house (*R.* v. *Manning*, 1872, 41 L. J. M. C. 11); (*b*) any matter or thing in, under, or against, any building, under such circumstances that, if the building were thereby set on fire, it would be felony (s. 7, *R.* v. *Heseltine*, 1873, 12 Cox C. C. 404; *R.* v. *Child*, 1871, L. R. 1 C. C. R. 307; *R.* v. *Nattrass*, 1882, 15 Cox C. C. 73; *R.* v. *Harris*, 1882, 15 Cox C. C. 75; *R.* v. *Batstone*, 1864, 10 Cox C. C. 20).

7. It is a misdemeanor, punishable by penal servitude from three to

fourteen years, unlawfully and maliciously to attempt, by any overt act, to set fire (*a*) to any building (s. 8), (*b*) to any mine (s. 27), to any ship or vessel (s. 44), under such circumstances, that if the building, mine, or vessel were set on fire, the offender would be guilty of felony.

8. It is also a misdemeanor, punishable by penal servitude from three to seven years, unlawfully and maliciously to attempt, by any overt act, to set fire to crops or stacks (24 & 25 Vict. c. 99, s. 18).

9. The uttering, sending, or delivering of written threats to burn houses, buildings, ships, or agricultural produce, is a felony punishable by penal servitude from three to ten years (24 & 25 Vict. c. 97, s. 50).

The punishment of the offences 4 to 9 is regulated, as to penal servitude, by the sections constituting each offence and the Penal Servitude Act, 1891, 54 & 55 Vict. c. 69, s. 1. Persons convicted of any of these offences may alternatively be sentenced to imprisonment, with or without hard labour, for not more than two years (54 & 55 Vict. c. 69, s. 1), and if males under sixteen (see the sections) may be sentenced to whipping in addition to the term of penal servitude or imprisonment. Offences 6, 7, 8, 9 are triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

10. If any person is burnt to death in consequence of the commission of any of the above offences, the offender is liable to conviction for murder (*R.* v. *Serné* (No. 1), 1887, 16 Cox C. C. 311). After trial and acquittal for murder in such a case, the accused can be re-tried for arson on the same facts (*R.* v. *Serné* (No. 2), 1887, 107 Cent. Crim. Ct. Sess. Paper, 418).

For the purpose of all these offences the fire must be lit wilfully and maliciously, *i.e.* deliberately, without any *bonâ fide* claim of right (*R.* v. *Twose*, 1879, 14 Cox C. C. 327), and not by negligence or accident (*R.* v. *Faulkner*, 1877, 13 Cox C. C. 550); and to constitute a completed felony, there must be more than a mere scorching, *i.e.* some actual ignition, blaze, or charring (*R.* v. *Parker*, 1839, 9 Car. & P. 45). The "malice" to be proved need not be malice against the owner of the property against which the offence is attempted or committed (24 & 25 Vict. c. 97. s. 58). The term malice excludes negligence or accident (see Arch. Cr. Pl., 23rd ed., 651, 701; *R.* v. *Russell*, 1842, C. & M. 541). On indictment for any of the felonies the jury may convict of the attempt (14 & 15 Vict. c. 100, s. 9). See also EXPLOSIVES.

[See 3 Russ. on *Crimes*, 6th ed., 781, 792, 796-7, 810, 820-823, 959-975; Arch. Cr. Pl., 23rd ed., 647-663; Stephen, *Dig. Crim. Law*, 6th ed., arts. 417, 419-421; Fost., 2nd ed., 113-116, 192, 333, 334; Hawk., P. C., bk. i. c. 39.]

Art, Schools for Science, etc.—See EDUCATION.

Art, Works of, Destroying.—See MALICIOUS DAMAGE.

Art Union.—Voluntary associations formed before the Act for legalising Art Unions, 9 & 10 Vict. c. 48, for the purchase of paintings or other works of art, to be distributed by chance or otherwise, or as prizes among the subscribers, and similar associations formed subsequently, are, by the Act referred to, declared to be lawful associations, notwithstanding the Lottery Laws, if the society be constituted by royal charter, or its deeds of constitution and rules be approved by the Privy

Council. The best known society under the Act is the Art Union of London, which was incorporated by charter in 1846, for the advancement of art and the encouragement of artists. The more important rules of the society are set out in the report of the *Overseers of the Savoy* v. *The Art Union of London*, [1894] 2 Q. B. 609; [1896] App. Cas. 296. In the case cited it was ultimately decided that the buildings of the society are not exempted from rates, because subscriptions by which the society is supported, being given for value, are not "voluntary" within the meaning of 6 & 7 Vict. c. 36, s. 1. The meaning of the word "voluntary," as used above, is commented upon in *Attorney-General* v. *Ellis*, [1895] 2 Q. B., at p. 470. See also *Royal College of Music* v. *Westminster Vestry*, [1898] 1 Q. B., at p. 817.

Articled Clerk. — See APPRENTICE; INFANT; NOTARY; SOLICITOR.

Articles.—In criminal proceedings in the Ecclesiastical Courts, the first plea is termed the articles, because in form it runs in the name of the judge who articles and objects the facts charged against the defendant. In plenary causes not criminal, the first plea is termed the libel (*q.v.*), and runs in the name of the party, or his proctor, who alleges and propounds the facts founding the demand (Rogers, *Ecclesiastical Law*, p. 653). Where the ordinary has allowed his office —*i.e.* the office of the judge is promoted—the whole transaction must be fairly and specifically stated, to enable the defendant to give an affirmative issue. The general words of articles are construed only to include subordinate charges, *ejusdem generis*, with the principal. It is not a fatal objection that the articles are exhibited in the name of the surrogate and not of the judge, or in the name of the bishop instead of his official; but where the office of the judge is wrongly described, the error is fatal, and may be pleaded in bar of further proceedings (Phillimore, *Ecclesiastical Law*, 2nd ed., 991).

Articles of Association.—See COMPANY.

Articles of Partnership.—See PARTNERSHIP.

Articles of the Peace.—A complaint made or exhibited by any person to the Lord Chancellor, the High Court, or a Court of Assize, or Quarter Sessions, or Court of Summary Jurisdiction, setting out that the complainant fears, with just and reasonable cause, that another person will do or cause to be done to him (or, it would seem, to his wife or child) some bodily harm, or will burn his house (1 Hawk., P. C., c. 60, s. 62). The articles must be verified by the oath of the complainant; and the person incriminated may not answer or controvert the allegations contained in the articles (*R.* v. *Dunn*, 1840, 12 Ad. & E. 599; 54 R. R. 631); though he may by cross-examination or evidence explain ambiguities in the complaint, or negative the inferences sought to be drawn from the facts alleged against him (*R.* v. *Dunn*, *ubi sup.*); nor may he supplement omissions therein, nor may he show cause why the articles should not be discharged (*R.* v. *Mallinson*, 1851, 16 Q. B. 367). The Court, if satisfied that upon the face of the articles there are reasonable grounds of fear, is bound *ex officio* to require sureties for the peace (*Lort* v. *Hutton*,

1876, 45 L. J. M. C. 95). The High Court may require sureties where an inferior Court has refused them (*R.* v. *Mallinson*, 1851, 16 Q. B. 367), or quash an order for sureties made on insufficient grounds, by an inferior Court (*R.* v. *Dunn*, 1840, 12 Ad. & E. 599; 54 R. R. 631). At common law no order for costs can be made.

Articles of the peace are distinct from applications to order sureties for good behaviour, and the power to grant them is distinct from that under which Courts act in requiring persons, on *conviction*, to give security of the peace or good behaviour. See RECOGNISANCE; SURETIES OF PEACE.

The procedure is of a special or exceptional character, being what has been termed a branch of preventive justice (4 Black. *Com.* c. 18), in the nature of a *quia timet* suit in a criminal case, to obtain security against *future* breaches of the peace. See QUIA TIMET.

Jurisdiction.—The jurisdiction of justices of the peace, to require sureties to keep the peace, rests upon immemorial usage, as established by judicial decisions (see *R.* v. *Justices of Queen's County*, 1882, 19 L. R. Ir. 294, 301). Its origin is variously assigned to—(1) the powers inherited from conservators of the peace; (2) the statutes 34 Edw. III. c. 1, and 3 Hen. VII. c. 2; and (3) the commission of the peace, which may, perhaps, be read as a contemporary or traditional exposition of the Act of Edw. III. The commission of the peace for counties, as settled by Sir Christopher Wray in 1590, and re-settled and modernised under the Crown Office Act, 1877, 40 & 41 Vict. c. 41, contains the following provisions:—

"Know ye that we have assigned you, jointly and severally, and every one of you our justices, to keep our peace, etc., and to cause to come before you, or any one of you, all those who to any one or more of our people, concerning their bodies or the firing of their houses, have used threats, to find sufficient security for the peace or their good behaviour towards us and our people (Arch. Q. S., 4th ed., 22). If they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept."

The jurisdiction may be exercised at Quarter Sessions or at Petty Sessions, or by a single justice (42 & 43 Vict. c. 49, s. 25). The High Court, as successor of the Courts of King's Bench and Chancery, is held always to have had, as conservators of the peace (independently of 34 Edw. III. c. 1, and the commissions of the peace), original jurisdiction to receive articles of the peace, as well as supervisory jurisdiction over the acts of ordinary justices. This jurisdiction has been recognised by statute as to England (21 Jac. I. c. 8, s. 1), and as to Ireland (10 & 11 Car. I. c. 10, Ir.); and see *Ex parte Seymour*; *R.* v. *Davitt*, 1883, 12 L. R. Ir. 46. Under the common law or usage, there was no limit to the period for which the accused could be required to give security for the peace in the Court of King's Bench (*R.* v. *Bowes*, 1787, 1 T. R. 696; 1 R. R. 363), or it would seem in a Court of Assize or Quarter Sessions, or even before a single justice (*Willes* v. *Bridger*, 1819, 2 Barn. & Ald. 278; 20 R. R. 434; *Prickett* v. *Greatrex*, 1846, 8 Q. B. 1021; 70 R. R. 721). But it was unusual to exceed one year, unless a longer term seemed essential to subserve the ends of justice.

Procedure.—The procedure in the King's Bench Division of the High Court is regulated by the Crown Office Rules, 1886, rr. 280-290 (and see Short and Mellor, *Crown Office Practice*, 417). The Court of Chancery

also had jurisdiction (21 Jac. I. c. 8, s. 1). But no application for the exercise of original jurisdiction, by any branch of the High Court or Court of Assize, has been made since the Judicature Acts. It is said that these Courts alone have jurisdiction, where the persons ought to be bound is peer or peeress (Hawk., P. C., 7th ed., bk. i. c. 60, ss. 5, 8). Dalton, c. 117, puts this upon "the opinion which the law hath of the peaceable disposition of noblemen." As to procedure before Courts of Quarter Sessions, see Arch., *Quarter Sessions Practice*, 4th ed., 612-616; Pritchard, *Quarter Sessions*, 2nd ed. The old procedure is now rarely employed, since under sec. 25 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, it is provided that the power of a Court of summary jurisdiction, on complaint of any person, to adjudge a person to enter into a recognisance and find sureties to keep the peace, or to be of good behaviour toward such first-named person, shall be exercised by order upon complaint, and the complainant and defendant and witnesses may be examined and cross-examined, and the complainant and defendant shall be liable to costs, as in the case of any other complaint. An order under this section can be varied (42 & 43 Vict. c. 49, s 26; Summary Jurisdiction Rules, 1886, r. 17). Since the passing of the Act, the old practice by which a justice bound the defendant by recognisance to answer to the articles at the Sessions (see 7 Geo. IV. c. 64, s. 31; 16 & 17 Vict. c. 30, s. 2) has fallen into disuse. If the defendant refuses or fails to find the required security, he may be imprisoned for not more than six months by a Petty Sessional Court, or than fourteen days by any other Court of summary jurisdiction, including a single justice (42 & 43 Vict. c. 49, s. 25, superseding 16 & 17 Vict. c. 30, s. 3). As to quashing orders made irregularly or without jurisdiction, see *Bent* v. *Ingle*, 1892, 66 L. T. Rep. 138; *R.* v. *Londonderry JJ.*, 1892, 28 L. R. Ir. 440.

Recognisances.—The recognisance to keep the peace is by bond, in favour of the Crown (see BAIL). If the conditions are broken, and the obligor convicted, the recognisances may be estreated or put in process—(1) In the High Court, by order of the Court on notice to the obligor (Cr. Off. Rules, 1886, r. 128); (2) In Courts of Quarter Sessions, in the case of recognisances there taken, or returned thither, under 3 Henry VII. c. 2, by order of the Court (7 Geo. IV. c. 64, s. 3; 16 & 17 Vict. c. 30, s. 2); (3) In Courts of summary jurisdiction, under sec. 9 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49.

[For authorities on the subject, see Lambard, *Eirenarcha;* Hawk., P. C., bk. i. c. 60; Dalton, *Country Justice*, cc. 116-122; 4 Black. *Com.* c. 18; Arch., *Quarter Sessions Practice*, 4th ed., pp, 609-616; Burn's *Justice*, 13th ed., vol. v., "Sureties of Peace"; Stone, *Justices' Manual*, 38th ed., tit. "Surety of the Peace"; Pritchard, *Quarter Sessions*, 2nd ed.; and Saunders' *Practice of Magistrates' Courts*, 6th ed., 288-294.]

Articles of War.—See WAR.

Articles, The Thirty-Nine.—The Thirty-Nine Articles of religion, "for the avoidance of diversities of opinions and for the establishing of consent concerning true religion," were agreed upon by the archbishops and bishops of both provinces, and the whole clergy in convocation, in the year 1562, and put forth by Queen Elizabeth's authority. They were ratified by the Convocation of Canterbury, with the Queen's consent, in 1571. The same year the statute 13 Eliz. c. 12.

for the first time, required subscription to them on the part of ecclesiastical persons; and by sec. 2 (which is still in force) provided the penalty of deprivation for advisedly maintaining or affirming any doctrine directly contrary or repugnant to them. Canon 5 of 1603 declares *ipso facto* excommunicate, those who affirm that any of the Articles are in any part superstitious or erroneous. But these canons do not *proprio vigore* bind the laity (*Middleton* v. *Crofts*, 1736, 2 Atk. 650; 26 E. R. 788). In 1623, James I. again ratified and confirmed the Articles. "His Majesty's Declaration," while claiming the King to be supreme governor of the Church of England, expressly recognises the constitutional position of the two Convocations. It would be obviously foreign to the purpose of the present work to enter upon any discussion of the history or theology of the Articles. They present, in the language of the time, not an entire system of theology, but rather what the Church of England synodically held to be a fair scriptural statement of the cardinal tenets of Christianity. Legally, they may be considered, as far as they go, to be a definition of the doctrines of the Church of England (*The King's Proctor* v. *Stone*, 1808, 1 Hag. Con. 424, *per* Lord Stowell. See also *Heath* v. *Burder*, 1862, 15 Moo. P. C. 1; 15 E. R. 394; *Voysey* v. *Noble*, 1871, L. R. 3 P. C. 357; 15 Moo. P. C. (N. S.) 167; 17 E. R. 65).

The legal duty of the clergy to subscribe and declare assent to the Articles is now regulated by the Clerical Subscription Act, 1865, 28 & 29 Vict. c. 122, and Canon 36 of 1603, as revised by the convocations, under royal licence, in 1865. It is believed that the only laymen on whom the duty now rests are—

1. Judges ecclesiastical (*i.e.* chancellors, commissaries, and officials), under Canon 127 of 1603.

2. "Any governor or head of the colleges of Westminster, Winchester, and Eton" (whether in holy orders or not), under the Caroline Act of Uniformity (14 Car. II. c. 4, s. 13), this part of the section being unaffected by the Public Schools Act, 1868, 31 & 32 Vict. c. 118, or by the Universities Tests Act, 1871, 34 & 35 Vict. c. 26. But as to a college in the University of Oxford, founded since the last-named Act, see *R.* v. *Hertford College*, 1878, 3 Q. B. D. 693.

Artificial Stream.—This expression is used to denote that class of water-courses which are not natural, and therefore are not invested with natural rights and corresponding obligations. It includes such water-courses as drains, streams dug through land for the supply of water to a mill or engine, canals and water pumped from a mine. Generally it is apparent, from the condition of a stream, whether it is to be classed as natural or artificial, but it sometimes happens in the case of ancient water-courses that it is almost impossible to decide to which class they belong; and they may sometimes be of such a character that, though artificial in reality, they may have been so made, and of such a permanent nature, as to be considered natural for the purpose of the respective rights and obligations of riparian owners. As a general principle, it has been laid down that an artificial stream is one that arises by the agency of man, or, though arising from natural causes, flows in a channel made by man. Easements may be acquired in artificial streams either by grant or by prescription, either at common law or under the Prescription Act (2 & 3 Will. IV. c. 71, s. 2). See

EASEMENTS; PRESCRIPTION; WATER-COURSE. See also Goddard on *Easements;* Gale on *Easements.*

Artisans.—During the last reign various statutes were passed with the object of opening up densely-crowded and unhealthy areas, and of securing to the artisan class houses of an improved character from a sanitary point of view. These enactments have all practically been repealed, but, with additions, reproduced in one general consolidating statute, "The Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70" [which has been further extended by the Housing of the Working Classes Acts, 1900, 63 & 64 Vict. c. 59, and 1903, 3 Edw. VII. c. 39]. This Act has three main divisions, dealing respectively with unhealthy areas, unhealthy dwelling-houses, and working-class lodging-houses.

Part i. (which has no application to rural sanitary districts) deals with unhealthy areas. It provides (s. 4) that, where a medical officer of health makes an official representation (in writing, s. 79) to a local authority that within a certain area, either (*a*) any houses, courts, or alleys are unfit for human habitation, or (*b*) that the narrowness, closeness, or bad arrangement of the streets and houses, or groups of houses, are, by sanitary defects, dangerous or injurious to the health of the inhabitants of these or adjoining houses, and that the evils connected therewith cannot be effectually remedied otherwise than by an improvement scheme for the rearrangement and reconstruction of the streets and houses within such area, or some of them, the local authority shall take such representation into consideration, and, if satisfied of its truth, and of the sufficiency of their resources, shall pass a resolution to the effect that such area is an unhealthy area, and that an improvement scheme ought to be made. Such local authority is thereupon required to make a scheme, and it is provided that any number of such areas may be included in one scheme. In the case of a representation being made to the London County Council, relating to not more than ten houses, the council are not to proceed under this part of the Act, but are to direct their medical officer of health to represent the case to the local authority under part ii., and any disputes between the London County Council and a local authority, as to the limits of the area to be dealt with, are to be decided by an arbitrator appointed by a Secretary of State (ss. 72-73). An improvement scheme must be accompanied by the necessary documents to show how it is to be worked out in detail, and it must further provide, if it comprises [any urban area, for re-housing (sec. 11, Act of 1890, and 3 Edw. VII. c. 39, schedule), see *infra*]. After due notice of the completion of the scheme has been given (s. 7), the local authority are to present a petition for an order confirming the same; the confirming authority being a Secretary of State if the area in question is within the county or city of London, and the Local Government Board if the area is situated elsewhere. If the confirming authority think fit to proceed with the scheme, they are to direct a local inquiry, due notice whereof must be given (s. 18). The officer conducting such inquiry is empowered to administer oaths (s. 19); and, after receiving his report, the confirming authority may make a provisional order, declaring the limits of the area comprised in the scheme, and authorising such scheme to be carried into execution (s. 8, subs. 4). The provisional order, which has no validity unless and until confirmed

by Act of Parliament (s. 8, subs. 6), must be served upon the persons to be affected by it, except tenants for a month or less period (s. 8, subs. 5). When a provisional order is confirmed, the local authority are to carry out the scheme; for this purpose they may sell or let all or any part of the land to be acquired, or they may engage with any body of trustees, society, or person, or, without themselves acquiring the land, they may contract with the person entitled to the first estate of freehold for carrying the scheme into effect. In any grant or lease of the land appropriated by the scheme for the erection of dwelling-houses, suitable conditions and restrictions must be inserted as to the elevation, size, sanitary arrangements of the houses, as well as a prohibition against division of the buildings (s. 12). The local authority, without the express approval of the confirming authority, are not permitted themselves to undertake the rebuilding of the houses, or the execution of any part of the scheme, except that they may demolish the houses, clear the sites, and lay out, pave, sewer, and complete the streets (s. 12, subs. 3); if the local authority erect any dwellings out of funds provided by this part of the Act, they are required, unless the confirming authority otherwise determines, to sell and dispose of the same within ten years from their completion (s. 12, subs. 5). Secs. 20, 21 and the second schedule (which incorporate with certain modifications the Lands Clauses Acts) provide for the taking of land compulsorily, and establish the principle upon which compensation is to be assessed. Sec. 22, which provides for the extinction of rights of way and other easements, includes the easement of ancient lights (*q.v.*) even where only in process of acquisition (*Barlow* v. *Ross*, 1890, 24 Q. B. D. 381). But before taking any fifteen or more houses, for the purposes of the Act, notice of an intention to do so must be duly given not less than thirteen weeks previously (s. 14); and for the purpose of providing accommodation for those displaced, lands may be appropriated (sec. 23). [It is doubtful whether lands acquired for some specific purpose other than housing can be appropriated (*Attorney-General* v. *Hanwell U. D. Council*, [1900] 2 Ch. 377; 69 L. J. Ch. 626).] For carrying out the scheme a dwelling-house improvement fund is to be formed (s. 24), and borrowing powers are conferred (s. 25). [Repayment of loans is now spread over eighty years (3 Edw. VII. c. 39, s. 1).] Provision is made for the case of failure or neglect on the part of medical officers of health, or local authorities, to perform their statutory duties (s. 5, subs. 2; ss. 10, 13, 16); and power is given to the confirming authorities to issue forms of advertisements and notices. For these forms, see *Statutory Rules and Orders Rev.* [1904], *sub tit.* "Housing of Working Classes."

Part ii. of the Act has a more limited scope than part i.; it deals with unhealthy dwelling-houses as distinguished from unhealthy areas. [See 3 Edw. VII. c. 39, *infra.*] Provision is made for the closing and demolition of houses which are unfit for human habitation, and for dealing with houses which, although not in themselves unfit for human habitation, yet so obstruct light or air as to make adjoining houses unhealthy. A right of appeal is given to persons aggrieved, and provision is further made for improvement schemes, and for the compulsory acquisition of land for the purpose.

Part iii., which relates to working-class lodging-houses, is adoptive. See ADOPTIVE ACT. It may be adopted by local authorities generally [including now rural authorities who obtain the consent of the County

Council (63 & 64 Vict. c. 59, s. 2)]. The expression "lodging-houses for the working-classes" is defined (s. 53) as including "separate houses or cottages for the working-classes, whether containing one or several tenements;" the expression "cottage" may also include a garden of not more than half an acre, provided that its estimated annual value does not exceed £3. Local authorities may acquire, erect, and manage such lodging-houses for the working-classes (ss. 57-62). [Instead of themselves erecting lodging-houses, local authorities may now grant leases for building them. The conditions are laid down in 63 & 64 Vict. c. 59.] A tenant or occupier, or the husband or wife of a tenant or occupier, of such a lodging-house who is in receipt of parochial relief, other than merely temporary relief, is disqualified from continuing to be a tenant or occupier (s. 63). Facilities [by way of loan from the Public Works Loan Commissioners] are also given to railway and other public and trading companies for the erection of dwelling-houses for the working-classes in their service (ss. 67, 68); and to gas and water companies for supplying gratuitously, or on favourable terms, gas and water to working-class lodging-houses (s. 69).

Part iv. contains various supplementary provisions. Sec. 75 is important; it provides that "in any contract made after 14th August 1885 for letting for habitation by persons of the working-classes a house, or part of a house, there shall be implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation. [Any contract to the contrary is to be held void (3 Edw. VII. c. 39, s. 12).] In this section the expression 'letting for habitation by persons of the working-classes' means the letting for habitation of a house or part of a house, at a rent, not exceeding in England the sum named as the limit for the composition of rates by sec. 3 of the Poor Rate Assessment and Collection Act, 1869 (*i.e.* for London, £20; Liverpool, £13; Manchester and Birmingham, £10; elsewhere, £8), and in Scotland or Ireland, £4." In *Walker* v. *Hobbs & Co.*, 1889, 23 Q. B. D. 458, it was decided, on the corresponding section of the Housing of the Working Classes Act, 1885, that a tenant has, under the section, a right to sue his landlord for damages in respect of injuries caused by the premises not being reasonably fit for human habitation, owing to any defective state of repair. [In this case the limitations mentioned above do not seem to have been brought to the notice of the Court.] See APARTMENTS; LODGING HOUSES.

Parts v. and vi. apply the Act to Scotland and Ireland.

The Local Government Act, 1894, by s. 6, subs. 2, enables parish councils to make complaints under the above Act.

The Working Classes Dwellings Act, 1890, grants facilities for gifts of land or personal estate to be laid out in land, for the purpose of providing dwellings for working-classes in any populous places (see CHARITIES).

Sec. 3 of the Cheap Trains Act, 1883, enables the Board of Trade and the Railway Commissioners to make orders requiring railway companies to run, where necessary, a sufficient number of workmen's trains, for workmen going to and returning from their work, at such fares and at such times between six p.m. and eight a.m. as appear reasonable. See CHEAP TRAINS; ALLOTMENTS.

[The Housing of the Working Classes Act, 1903, 3 Edw. VII. c. 39, makes important alterations with respect to the re-housing of persons

living in urban areas who have been displaced by local authorities or by railway, etc., companies. Where thirty or more persons belonging to the working-classes will be displaced, the undertakers cannot proceed until the Local Government Board has either approved of a scheme for re-housing or decided that such is unnecessary (see the schedule to the Act). It is also provided by the Act that if a dwelling-place cannot be made reasonably fit for human habitation, the local authority need not, before obtaining a closing order, serve a notice on the owner or occupier to abate the nuisance (s. 8).

The Act also contains further provisions for transferring powers from the Home Office to the Local Government Board, for the failure of a local authority to make a scheme, and for modifying and amending schemes already made.]

As Customary.—See AFFREIGHTMENT (*Construction of Contract*).

As of Right.—See PRESCRIPTION.

Ashpits.—The expression "ashpit" in the Public Health Acts and the Public Health Acts Amendment Act, 1890, 53 & 54 Vict. c. 59, includes, for the purposes of the execution of these Acts, any ashtubs or other receptacles for the deposit of ashes, foul matter, or refuse (Public Health Acts Amendment Act, 1890, s. 11 (1)). By sec. 35 of the Public Health Act, 1875, every newly-erected house must have an ashpit, furnished with proper doors and coverings; sec. 36 empowers the local authority, if a house is without a sufficient ashpit, to require the owner or occupier to provide one, and by sec. 306 the owner may be empowered to enter for such purpose when the occupier prevents him.

An ashpit must be constructed and kept so as not to be a nuisance (*q.v.*) or injurious to health, and provision is made for the abatement of a nuisance arising from any defect in an ashpit (ss. 40 and 41). Regulations for the cleansing of ashpits are contained in secs. 42-44. Sec. 91 and following sections deal with nuisances, and any ashpit so foul or in such a state as to be a nuisance or injurious to health, is declared to be a nuisance, liable to be dealt with summarily, in the manner provided by the Act. In common, however, with the other nuisances enumerated in the section, it may be remedied by ordinary legal proceedings, as well as under the Act, provided that no person shall be punished for the same offence both under the Act and under any other law or enactment (s. 111, subs. 340 and 341).

Asportation.—See LARCENY.

Assart.—To change forest land into arable or pasture. No tenant of lands within a forest could assart them without the king's licence; if he did, they were seized into the king's hands until redeemed by a fine, assessed according to the value of the property assarted. A licence to assart could be obtained after a writ of *ad quod damnum;* if the licence were granted, an annual rent was usually reserved, called an assart rent. An assart made upon the king's demesne lands within a forest was punished by a fine assessed at double the rate of a fine in the case of an assart made upon private lands.

[*Vide* Manwood, *Forest Laws*, 5th ed., 1741, pp. 19-23.]

Assault is a threat, otherwise than by words, of using force to another, accompanied by a real or apparent capacity to carry out the threat at once, or an attempt to use such force (3 Russ. on *Crimes*, 6th ed., 304; Mayne, *Criminal Law of India*, 1896, p. 500; Arch. Cr. Pl., 23rd ed., 833 *et seq.*). It is almost invariably coupled with battery, which involves the actual use of force, without the consent of the person to whom it is applied (*R.* v. *Lock*, 1872, L. R. 2 C. C. R. 10), or in cases where assent to the use of force is illegal (*R.* v. *Coney*, 1882, 8 Q. B. D. 66). And see BATTERY. As to civil remedies for assault, see TRESPASS TO THE PERSON.

A common assault is punishable summarily by a fine not exceeding (with costs, if ordered) £5, or by imprisonment, with or without hard labour, for not more than two months (24 & 25 Vict. c. 100, s. 42); or upon indictment by imprisonment, with or without hard labour, for not more than one year (s. 47). Aggravated assaults on females or boys under fourteen may be summarily punished by fine not exceeding, with costs, £20, or by imprisonment, with or without hard labour, not exceeding twelve months. The accused cannot elect to be tried on indictment (42 & 43 Vict. c. 49, s. 17); but the justices, if the assault was accompanied by an attempt to commit felony, or is from its circumstances a proper subject for an indictment, must send the case to assizes or sessions (24 & 25 Vict. c. 100, s. 46. See *R.* v. *Gaunt*, 1895, 18 Cox C. C. 210). In the case of assaults within 24 & 25 Vict. c. 100, ss. 42, 43, on girls under sixteen or boys under fourteen, the procedure provisions of secs. 12-18 of the Prevention of Cruelty to Children Act, 1904, 4 Edw. VII. c. 15, are applicable. Where a husband is convicted summarily of an aggravated assault on his wife within 24 & 25 Vict. c. 100, s. 43, or is convicted on indictment of an assault on her, and sentenced to a fine over £5 or imprisonment exceeding two months, a separation order may be made by the Court of trial or by a Court of summary jurisdiction (58 & 59 Vict. c. 39, s. 4; *R.* v. *Knowles*, 1901, 65 J. P. R. 27). An assault causing actual bodily harm, if tried on indictment, is punishable by penal servitude for not less than three nor more than five years, or by imprisonment, with or without hard labour, for not more than two years (s. 47; 54 & 55 Vict. c. 69. s. 1 (1)).

Assaults on (*a*) officers of the High Court in the execution of their duty are punishable as contempt of Court; and (*b*) on bailiffs of County Courts in the execution of their duties, are punishable by a fine of £5 (51 & 52 Vict. c. 43, s. 48) by the judge of the Court or by a Court of summary jurisdiction (*Lewis* v. *Owen*, [1894] 1 Q. B. 102).

A defendant convicted on indictment of assault may be ordered, in addition to his sentence, to pay the costs of the prosecution (24 & 25 Vict. c. 96, ss. 74, 75), and if the assault is felonious, may also be ordered to pay compensation, not exceeding £100, for injury to property resulting from the assault (33 & 34 Vict. c. 23, s. 3).

Assault with intent to rob is a felony (24 & 25 Vict. c. 96, ss. 42, 43).

The following assaults are indictable misdemeanors:—(1) With intent to commit felony, other than murder or robbery (24 & 25 Vict. c. 100, s. 38); (2) On constables in the execution of their duty (same sec.), also punishable summarily (34 & 35 Vict. c. 112, s. 12; 48 & 49 Vict. c. 75, s. 2); (3) On clergymen in discharge of their duties (24 & 25 Vict. c. 100, s. 30); (4) On magistrates protecting wrecks (s. 31). As to assaults

on females or males, with sexual objects, see ABOMINABLE CRIME; RAPE. As to assaults in labour disputes, see TRADE UNION.

Assay.—To determine the fineness of the metals of the coinage, and of gold and silver plate, in relation to the standard specified by law.

Gold coins must be eleven-twelfths fine gold to one-twelfth of alloy; silver coins thirty-seven-fortieths fine silver, and three-fortieths alloy. A remedy allowance for variation is provided (Coinage Acts, 1870, 1891, 33 Vict. c. 10, and 54 & 55 Vict. c. 72, schedules); and the trial of the Pyx is to be made at least once a year. For various Acts as to assaying gold and silver plate, see preamble to 12 Geo. II. c. 26, 1738, which provided that no plate should be made, sold, exchanged, or exported, unless, if gold, it should be marked as of 22 carats, and if of silver of 11 oz. 2 dwts. per lb. troy. The marks were to be the worker's mark, the London Goldsmiths' Company's mark, namely, the leopard's head, the lion passant, and the year mark; or, at certain provincial towns, the worker's mark, and the appointed town marks. If the silver were of 11 oz. 10 dwts. fineness, then with the worker's mark, and the Company's mark of the lion's head erased, the figure of Britannia and the year mark; or, in the provincial towns, with the appointed town marks.

Sec. 6 exempted certain small articles. By sec. 5 of 24 Geo. III. s. 2, c. 53, 1784, the king's head was to be added. By sec. 2 of 38 Geo. III. c. 69, 1798, the standard for gold plate was reduced to 18 carats; the new mark for that quality to be a crown, and the figure 18 instead of the lion passant. Sec. 1 of 17 & 18 Vict. c. 96, 1854, enacts that by order in council gold plate may be wrought of any standard, not being less than one-third part of fine gold. Existing standards and marks are not otherwise affected.

Wedding rings are exempted from this Act by 18 & 19 Vict. c. 60, 1855. See also Revenue Act, 1883, 46 & 47 Vict. c. 55, s. 10; 47 & 48 Vict. c. 62, s. 4; and, as to exemption from assay of certain foreign plate, 47 & 48 Vict. c. 62, s. 4. See also the Hall Marking of Foreign Plate Act, 1904 (4 Edw. VII. c. 6), which provides that imported foreign plate sent for assay shall be marked so as readily to distinguish it from English-made plate. See COIN.

Assembly, Unlawful.—The offence of unlawful assembly is described in 1 Hawk., P. C., c. 56, s. 9, as follows:—"An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembled together with an intent to do a thing which, if it were executed, would make them rioters (see RIOT), but neither actually executing it nor making a motion towards the execution of it. But this seems to be much too narrow a definition. For any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems to be properly called an unlawful assembly," etc. Earlier definitions will be found in the note to *R.* v. *Hunt*, 1820, 1 St. Tri. N. S. p. 434, one of the earliest references being in Y. B., 3 Hen. VII., where it is said that assemblies, lawful at the commencement, are not punishable unless *in terrorem populi domini regis*. The Criminal Code Commissioners suggest that the law was first adopted at a time when it was the practice for the gentry who

were on bad terms with one another to go to market at the head of bands of armed retainers (2 Steph. Hist. Cr. L. 385). Stephen, Dig. Cr. L. art. 75, defines an unlawful assembly as "an assembly of three or more persons (*a*) with intent to commit a crime by open force; (*b*) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly ground to apprehend a breach of the peace." This definition is supported by numerous authorities. Some doubt was expressed in *R.* v. *Dewhurst*, 1820, 1 St. Tri. N. S. 530, as to whether to constitute the offence, an apprehension of an immediate breach of the peace must be proved. This would appear not to be necessary; for a class of cases such as *R.* v. *Hunt*, 1820, 1 St. Tri. N. S. 171; *Redford* v. *Birley*, 1822, *ibid.* 1071; *R.* v. *Fussell*, 1848, 6 St. Tri. N. S. 723; *R.* v. *Ernest Jones*, 1848, *ibid.* 783—but see *R.* v. *Burns*, 1887, 16 Cox C. C. 355—have decided that a meeting with intent to raise discontent and disaffection, and excite hatred and contempt of the Government and Constitution, or to excite resistance to law, are unlawful assemblies; and the Irish Courts, in *O'Kelly* v. *Harvey*, 1883, 15 Cox C. C. 435, have expressed the opinion that so is a meeting to promote an unlawful conspiracy with regard to the payment of rent. None of the judicial references would appear to amount to an exact and exhaustive definition. Compare the charge of Alderson, B., at the Monmouth Assizes, 1839 (3 St. Tri. N. S. 1349), and his summing up in *R.* v. *Vincent*, 1839, *ibid.* 1037. In *Beatty* v. *Gilbanks*, 1882, 9 Q. B. D. 308, it was held that a peaceful meeting of the Salvation Army was not an unlawful assembly merely because there was good reason to believe that it would lead to a breach of the peace on the part of the opponents of the Army, who would endeavour to break it up. This case has been criticised by the Irish Court of Appeal in *O'Kelly* v. *Harvey*, 1883, 15 Cox C. C. 453.

A meeting to witness a prize-fight has been held to be an unlawful assembly (*R.* v. *Perkins*, 1831, 4 Car. & P. 537), but those present and countenancing it are also guilty of aiding and abetting an assault (*R.* v. *Coney*, 1882, 8 Q. B. D. 534). As to the offence of taking part in an unlawful assembly, it has been ruled that, if the purposes are unlawful, everyone who, after being aware of those purposes, attends as a partisan, without taking steps to counteract such purposes, is guilty of taking part in an unlawful assembly. A meeting may be lawful as to some purposes, unlawful as to others; lawful as to one period of time, and unlawful as to another (*R.* v. *Dewhurst*, 1820, 1 St. Tri. N. S. 530).

An unlawful assembly may be dispersed by force, without waiting until it has become a riot or the Riot Act has been read (see RIOT) (*Redford* v. *Birley*, 1822, 1 St. Tri. N. S. 1071; *R.* v. *Fursey*, 1833, 3 St. Tri. N. S. 543). In *O'Kelly* v. *Harvey*, 1883, 15 Cox C. C. 453, the Irish Court of Appeal have held that if an assembly be not unlawful, yet if there is a danger of breach of the peace (see PEACE, BREACH OF) owing to a threatened attack upon it by another body, the magistrates, as peace officers, are justified in dispersing the assembly though not unlawful. The opposite seems to have been impliedly ruled by Lord Coleridge, L.C.J., and Field, J., in *M'Clenagan* v. *Waters*, a case referred to by Mr. Dicey, as reported in the *Times* of 18th July 1882.

[See 2 Stephen's Hist. Cr. L. 385; Wise on *Riots, etc.*; Dicey, *Law of the Constitution*, Note V., Questions connected with the right of public meeting.]

Assent (Royal).—The royal assent is necessary to legislation, and by 13 Car. II. stat. 1, c. 1, s. 3, anyone who affirms "that both Houses of Parliament or either House of Parliament have or hath a legislative power without the king," is subjected to the penalty of a *praemunire* (*q.v.*). The term veto, which is generally applied to the power of invalidating what would otherwise have been valid, does not apply to the power of giving or withholding the royal assent. It was formerly doubted whether the giving of the royal assent to a single bill did not determine the session of Parliament, but the contrary has long been established. The royal assent may be signified by the sovereign in person in the House of Lords, or, as is now more usually done, by a royal commission under the Great Seal; this method dates from 33 Henry VIII., and its legality is declared by 33 Henry VIII. c. 21, the Act for the Attainder of Queen Catherine Howard. In 1811, when Geo. III. had become insane and incapable of performing any official act, the Lord Chancellor nevertheless affixed the Great Seal to a commission for giving the royal assent to the Regency Bill, which thus became law. Money bills are carried up by the Speaker of the House of Commons, and are the first to obtain the royal assent, the form being, "*Le Roy remercie ses bons sujets, accepte leur benevolence, et ainsi le veult.*" In the case of public bills, the form is "*Le Roy le veult;*" for private bills, "*Soit fait comme il est desiré,*" or, if the royal assent be withheld, "*Le Roy s'avisera.*" For a petition demanding a right, whether public or private, the form is "*Soit droit fait comme il est desiré.*" A now disused form of giving the assent of the Lords and Commons to an act of grace and pardon, which originated with the Crown, is given in Erskine May. These old French forms are a survival from the fourteenth century, when all the proceedings in Parliament were in French. The royal assent has not been withheld since Queen Anne refused her assent to the bill for settling the Scotch Militia in 1707 (18 Lords J. 506), owing to the arrival of news after the bill had passed both Houses, that the Pretender had sailed for Scotland. The chief reason of this is that since the Revolution the Crown acts on the advice of Ministers who are not in a position to defy Parliament; they must, therefore, advise the Crown to give the royal assent, or to appeal to a new Parliament by a dissolution. The royal assent has been so long disused that, as in so many other cases, a conventional rule or custom of the Constitution may be said to have grown up, regulating the *legal* right of the Crown to give or withhold its assent by providing that it should always be given. [As to the form of royal assent to Colonial laws, see COLONIAL LAWS.]

An Act comes into operation from the commencement of the day on which it receives the royal assent, unless otherwise specified, except where there are conflicting rights between subject and subject, for the ascertainment of which it is necessary to ascertain the actual priority (*Tomlinson* v. *Bullock*, 1879, 4 Q. B. D. 230).

[See Erskine May, *Parliamentary Practice;* Anson, *Law and Custom of the Constitution*, 3rd ed., vol. i. p. 297; Hearn, *Government of England*, p. 60; Dicey, *Law of the Constitution;* Todd, *Parliamentary Government in England.*]

Assessment.—See POOR LAW (*Rating*); RATING.

Assessment Committee.—The assessment committee is

a statutory committee appointed for the purpose of making out the valuation list, which is the basis of the poor-rate. The Union Assessment Acts, 1862, 1864 and 1880, 25 & 26 Vict. c. 103; 27 & 28 Vict. c. 39; 43 & 44 Vict. c. 7, apply generally throughout England and Wales, save in parishes where local Acts are in force. With regard to the metropolis, the Union Assessment Acts, 1862 and 1864, also apply; but many sections of those Acts are repealed by the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67, so far as they relate to the "unions and parishes not in union, which are, for the time being, either wholly, or for the greater part in value thereof, respectively situate within the jurisdiction of the London County Council" (32 & 33 Vict. c. 67, s. 3). It is the duty of the board of guardians of every union, at their first meeting after the annual election of guardians, to appoint from among themselves any number not less than six, nor more than twelve, to be members of the assessment committee (25 & 26 Vict. c. 103, s. 2). Where the union has the same bounds as a municipal borough, the clerk to the guardians shall, if directed by the guardians, transmit the names of the persons appointed to the town council of the borough, who may appoint from among themselves additional members not exceeding the number appointed by the guardians (*ibid.* s. 3). If the guardians neglect or be prevented from making the appointment, the Local Government Board shall appoint some other day on which the guardians shall make the appointment (*ibid.* s. 4; 34 & 35 Vict. c. 70, s. 2). If a member of the committee cease to be a guardian, or resign his seat on the committee, or die, or become incapable of acting, the board of guardians shall, with all convenient speed, appoint a guardian to supply the vacancy (25 & 26 Vict. c. 103, s. 5). Continuing members may act during any such vacancy (*ibid.* s. 6). The committee, whose authority extends over every parish comprised in the union (*ibid.* s. 7), must hold their first meeting at the board-room of the union, on a day fixed by the board of guardians (*ibid.* s. 8). The time and place of subsequent meetings are fixed by the committee (*ibid.*), and not by the guardians. Committees usually lay down rules for their guidance, but they have no power to bind their successors in regard thereto. The quorum of meetings is not less than three, and in any case not less than one-third of the whole number of the committee (*ibid.* s. 9). In case of equality of votes, the presiding chairman has a second, or casting, vote (*ibid.*). The committee shall employ the clerk or assistant-clerk of the guardians as their clerk, with such remuneration as the Local Government Board shall sanction (*ibid.* s. 10), such remuneration being paid by the guardians, and charged on the common fund (*ibid.* s. 38). It is the duty of the committee to cause a minute of their proceedings to be taken, and of the names of the members attending each meeting (*ibid.* s. 11). The minute-book, provided by the committee, shall be kept by the clerk, and every entry shall be signed by the presiding chairman present at the meeting at which the proceeding took place (*ibid.*). Such entries, so signed, shall be received as evidence in all Courts, without proof of such meeting having been duly convened or held, or of the persons attending such meeting having been or being members of the committee, or of the signatures of the members, all of which facts shall be presumed until the contrary is proved (*ibid.*). The committee, by their order, may, from time to time, require the overseers, assistant-overseers, constables, assessors, collectors, and any persons

having the custody of any books of assessment, of any taxes or rates, parliamentary or parochial, or of the valuation of any parish, or having the collection or management of any such taxes or rates, to make returns in writing to the committee of all such particulars as they may direct in relation to such taxes, rates or valuations, or any property included therein, so far as relates to the union for which they act (*ibid.* s. 13). A county rate for this purpose is a parochial rate (*R.* v. *Aylesbury Overseers*, 1846, 9 Q. B. 261); and the land-tax is a parliamentary tax (*Manning* v. *Lunn*, 1845, 2 Car. & Kir. 13; *Christ's Hospital* v. *Harrild*, 1841, 2 M. & G. 707; 58 R. R. 547), but a sewers rate is not (*Palmer* v. *Earith*, 1845, 14 L. J. Ex. 256). The committee may require persons having the custody of the before-mentioned books to make and transmit to them copies of or extracts from them, or to permit such copies or extracts to be made by such persons as the committee may direct (25 & 26 Vict. c. 103, s. 13), and they may also require persons having the custody of any such books, or the collection or management of the taxes or rates before mentioned, to attend before them and produce all parochial and public books of assessment, rates, rate-books, valuations, apportionments, tithes, and other maps, plans, surveys and other public documents in their custody or power (25 & 26 Vict. c. 103, s. 13); penalty on refusal not exceeding £20 (*ibid.* s. 40). The committee may examine all persons who shall attend before them (*ibid.* s. 13), but not, it would appear, upon oath; penalty on refusal to give evidence, or for giving false evidence, not exceeding £20 (*ibid.* 40). It is the duty of the overseers to prepare the valuation lists. Section 14 of the Act of 1862 directs that the overseers shall prepare the lists within three calendar months after the appointment of the committee, but this direction only applies to the first appointment of a committee under the Act, and not to a subsequent appointment (Circ. P. L. B., Mar. 1, 1864). A form of valuation list is contained in a schedule to the Act of 1862. A column in the form is headed "gross estimated rental," which is defined as "the rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any" (25 & 26 Vict. c. 103, s. 15). The valuation list for each parish, made and signed by the overseers, shall be deposited by the overseers in the place where rate-books are deposited or kept, and a copy shall be forthwith delivered to the board of guardians (*ibid.* s. 17). The overseers shall give public notice of the deposit on the Sunday next following the deposit, and all persons assessed or liable to be assessed to the relief of the poor of such parish shall have the like right of inspecting, and of demanding and taking copies of and extracts from, such list, as in the case of a poor-rate allowed by the justices; as to which see 17 Geo. II. c. 2, ss. 1, 5; 6 & 7 Will. IV. c. 96, s. 5; 45 & 46 Vict. c. 20, s. 4. At the expiration of fourteen days from the time of the notice given of the deposit the overseers shall transmit the list to the committee, and any overseer or other ratepayer within the union shall have the right of inspecting and taking copies of and extracts from any of the lists so transmitted (25 & 26 Vict. c. 103, s. 17). Overseers of any parish in any union who shall have reason to think that their parish is aggrieved by the valuation list of any parish within such union [see Form II., *infra*], or any person who may feel himself aggrieved by any valuation list [see Form I., *infra*], on the ground of unfairness or

incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from the list, may object by notice in writing to the committee, specifying the grounds, and in certain cases to the person whose hereditament is objected to, before the expiration of twenty-eight days after the notice of the deposit (*ibid.* s. 18). The committee shall hold such meetings as they think necessary for hearing objections, twenty-eight days' previous notice of which must be given (*ibid.* s. 19).

The hearing and *determining* of an objection to the valuation list is a condition precedent to appealing against the rate based upon it to Quarter Sessions. Even if the case be hung up temporarily by the assessment committee, the ratepayer must wait (Act of 1864, s. 1; *Williams* v. *Bedminster Union*, 1874, 1 Q. B. D. 503; 38 J. P. 374; 45 L. J. M. C. 117).

Every subsequent rate made in conformity with a valuation list objected to when first published, still requires a new objection and hearing before the assessment committee in order to entitle an objector to appeal to Quarter Sessions (*R.* v. *Essex JJ.*, [1902] 1 K. B. 180; following *R.* v. *Great Western Rly.*, 1869, L. R. 4 Q. B. 323; 20 L. T. 481).

Proceedings before Assessment Committee.—On the publication of the valuation list, it is advisable at once to give notice of objection to the committee, and ask for relief. Notice must also be given to the overseers of the parish in which the property is situate, and if the rating of a third person be objected to, notice must be given to that person also.

The notice must be in writing, and must state the general grounds on which objection is taken, and if the objector intends to go beyond the committee, he must be certain that every reasonable ground is covered, as the grounds taken before the committee, and those only, can be heard by Quarter Sessions (*R.* v. *London JJ.*, [1897] 1 Q. B. 433; *R.* v. *Essex JJ.*, [1902] 1 K. B. 180).

Notice may be given "at any time after the deposit as aforesaid of such list" (Act of 1862, s. 18; Act of 1864, s. 1), but in point of fact the time is necessarily limited by the life of the committee (one year). It is usual to give the notices as soon as practicable.

A recent decision makes it clear that so long as an appeal is brought during the currency of a rate, and without unreasonable delay, even if several meetings of the assessment committee have been held and a Quarter Sessions has gone by, an objector may still go before the committee, and then afterwards appeal to Quarter Sessions (see *Imperial and Grand Hotels Co.* v. *Christchurch Guardians*, [1905] 2 K. B. 239).

The notices must be served (*a*) on the assessment committee (1) by leaving at clerk to guardians' office; (2) by post, addressed to assessment committee at clerk to guardians' office; (3) by personal service on clerk to guardians; or (4) by leaving at clerk's usual place of abode: (*b*) On overseers and third persons by personal service, or by leaving at place of abode (Act of 1862, s. 42). Service by post is usually employed and accepted, but there is no statutory authority for it. If postal service be employed, an acknowledgment should always be asked for and obtained.

The objector need neither appear nor be represented before the committee, but this is a procedure hardly ever adopted. He usually appears either personally or by his legal representative, but may do so

by a non-legal agent (*R.* v. *A. C. of St. Mary Abbot's, Kensington*, [1891] 1 Q. B. 378).

The committee may deal only with the grounds given in the notice of objection (Act of 1862, s. 19), and must come to a decision, though this need not be immediate. See *Williams* v. *Bedminster Union, supra.*

The objector need not disclose the whole of his case before the committee, nor need he bring any evidence. It is usual to give general heads of objection, and to explain details only if required, unless it is thought that so substantial a reduction can be obtained as to obviate the necessity of further proceedings.

If the ratepayer is still dissatisfied he may appeal, and his appeal lies to the next practicable Quarter Sessions. As to what are "next practicable sessions," see *R.* v. *Biggleswade Union*, 1869, 21 L. T. 494; *Liverpool Gas Co.* v. *Everton*, 1871, L. R. 6 C. P. 414; 40 L. J. M. C. 104; *Imperial Hotels Co.* v. *Christchurch Guardians*, [1905] 2 K. B. 239.

The committee have no power to administer an oath, or to make an order as to costs. The committee may, whether any objection be or be not made to any valuation list, direct a further valuation and correct the valuation lists, and, when corrected, approve the same (25 & 26 Vict. c. 103, s. 20). A valuation list when altered must be re-deposited (*ibid.* s. 21; *R.* v. *Chorlton Union*, 1872, L. R. 8 Q. B. 5), so that persons interested may be informed of the alterations, and may make fresh objections, after which the list is to be approved. If, on appeal, a rate is amended, the committee must alter the valuation list accordingly (25 & 26 Vict. c. 103, s. 22). After approval of the list, the committee are required to give a fair copy, signed by three members, to the overseers, and retain the original (*ibid.* s. 23; 31 & 32 Vict. c. 122, s. 30). The valuation list in force in a parish (not subject to a local Act) at any time, is the approved valuation list subject to the alterations and additions made thereto by supplemental valuation lists (25 & 26 Vict. c. 103, s. 24). It is the duty of overseers to prepare supplemental valuation lists, in case of additions to, or alterations in, the rateable property of the parish (*ibid.* s. 25). New houses completely finished and ready for occupation, even though not occupied, must be inserted in the list (*R.* v. *Malden Overseers*, 1869, L. R. 4 Q. B. 326). The committee may, from time to time, direct a new or supplementary valuation list to be made by the overseers, or by a person appointed for the purpose, with the consent of the board of guardians (25 & 26 Vict. c. 103, s. 26). The provisions as to deposit, objections, approval, etc., of a valuation list apply to a supplemental valuation list (*ibid.* s. 27). After a valuation list has been approved, no rate shall be allowed, unless made according to such list (*ibid.* s. 28). The expenses of overseers, subject to the consent of the vestry (*ibid.* s. 7), or parish council or parish meeting in rural parishes (56 & 57 Vict. c. 73, ss. 6, 19 (4); see also s. 33), or if no meeting be held, or no decision arrived at on the subject, then to the extent which the assessment committee shall allow, are charged upon the poor-rate (27 & 28 Vict. c. 39, s. 7). This consent need not be obtained before the expenses are incurred (*R.* v. *Chorlton-upon-Medlock*, 1875, 1 Q. B. D. 62). The expenses of the committee are paid by the guardians of the union, and charged upon the common fund (25 & 26 Vict. c. 103, s. 38), and the expenses of making a valuation and valuation list of a parish are charged upon the poor-rate of the parish, if the valuation made by direction of the committee exceed one-sixth the amount of the valuation delivered to them by the overseers

(*ibid.* s. 39). In certain cases the committee may allow compensation for returns, etc. (*ibid.* s. 37). The committee shall cause a copy of the valuation list to be deposited in the board-room of the union, and it shall be open to the inspection, at reasonable times, of guardians and overseers without charge, and of any ratepayer within the union on payment of one shilling (*ibid.* s. 31). The clerk of committee shall send annually, in the month of December, to the clerk of the peace, totals of valuation lists (27 & 28 Vict. c. 39, s. 9). Any railway, telegraph, canal, gas and water company, named in a list as occupier, and having no office or place of business in the parish, shall receive from the committee notice of the rateable value entered within fourteen days after the transmission to the committee of any valuation or supplemental valuation list (*ibid.* s. 5). In certain cases a loan may be obtained for valuation purposes (*ibid.* s. 8), as also a map or plan (*ibid.* s. 10). It is the duty of the board of guardians, in the month of April in every year, to report the proceedings of their assessment committee to the Local Government Board (25 & 26 Vict. c. 103, s. 12).

As to appeals against the valuation list, see RATING.

FORMS.

[*Outside the Metropolis.*]

[NOTE.—The two forms given below should be used when it is not intended to carry the appeal further than the assessment committee. The usual objections only have been given. Very occasionally objections are taken on formal questions or the procedure of the assessment committee, but the general practice is for both parties to waive formalities and to let the appeal be heard on the merits.]

I. *Notice of Objection to a Valuation List, or a Supplemental Valuation List, before the Assessment Committee by an Individual.*

To the Assessment Committee of the Union, in the county of , and to the Churchwardens and to the Overseers of the Poor of the Parish of , in the said union [and to ,[3] of , in the said parish].

I, , of , in the said parish, being a person aggrieved by the valuation list[5] thereof, hereby give you notice of objection thereto on the following grounds:—

[*As to Amount.*]

1. That the valuation in respect of the hereditament numbered therein is unequal, unfair and incorrect.

2. That in respect of the hereditament numbered therein, I am assessed at too great a sum.

3. That my gross estimated rental is assessed too high.

4. That an insufficient sum has been allowed by way of deduction from my said gross estimated rental.

5. That my rateable value is too high.

(*For notes see p.* 540.)

[*As to Complaint of Valuation of Others.*]

6. That in respect of the hereditament numbered in the said valuation list, you, the said ,[3] are assessed at too small a sum.

7. That your gross estimated rental is assessed at too small a sum.

8. That too great a sum has been allowed by way of deduction from your gross estimated rental.

9. That your rateable value is too low.

[*Erroneous Principle of Valuation.*]

10. That the assessment of the property numbered therein was made on an erroneous principle.[10]

[*Omission from List.*]

11. That a certain rateable hereditament, known as , in the said parish, is omitted from the said list.

Dated the day of , 19 .

(*Signed*)[9]

II. *Notice of Objection to a Valuation List, or Supplemental Valuation List, before the Assessment Committee by Overseers, by Parish Council,*[1] *or by some other Representative Body.*

To the Assessment Committee[2] of the Union, in the county of , and to the Churchwardens and Overseers of the Poor of the Parish of , in the said union [and to ,[3] of , in the said parish].

I,[4] , of , being Overseer of the Parish of , in the said union, having reason to think that my said parish is aggrieved by the valuation list[5] thereof, do hereby give you notice of objection thereto on the following grounds:—

1. That the rateable hereditaments of the said parish of [6] are valued at less than the annual rateable value thereof.

2. That the rateable hereditaments of the said parish of [7] are valued beyond the annual rateable value thereof.

3. That the gross estimated rental of the hereditament numbered in the valuation list for the said parish of [6] is assessed at too low a sum.

4. That the gross estimated rental of the hereditament numbered in the valuation list for the said parish of [7] is valued at too great a sum.

5. [That a certain rateable hereditament known as , in the parish of ,[6] is omitted from the said list.]

6. That the assessment of the property numbered thereon, in the said parish of , was made on an erroneous principle.[10]

7. That no notice[8] of a meeting to hear objections to the said list

(*For notes see p.* 540.)

was sent to us by you, the said assessment committee, although such a meeting was held on .

Dated the day of , 19 .

(Signed)[9]

[*Description.*]

[1] If a parish council is giving notice, the overseers objecting need not give notice to themselves (as representing the parish council).

[2] Union Assessment Committees Act, 1862, s. 18.

[3] *i.e.* to any third party whose valuation is specially objected to.

[4] Or, "we, being overseers;" or, "I, , of , being clerk to the Parish Council of the Parish of , in the said county, which has reason to think the said parish is aggrieved by the valuation list thereof, do hereby, on behalf of the said parish council, give you notice of objection thereto;" or, "I, , of , being duly authorised by the parish meeting of the Parish of , in the said county, etc." All with necessary consequential variations.

[5] Or, "supplemental valuation list."

[6] *i.e.* the parish other than the objector's.

[7] *i.e.* the objector's own parish.

[8] *i.e.* in accordance with sec. 19, Union Assessment Committees Act, 1862.

[9] The objector may sign for himself, but if his solicitor or agent sign for him it should be "(Signed) , by and on behalf of the above-named ."

[10] This might apply to an individual assessment or to the method on which the whole list was prepared, though wholesale objections are seldom worth making.

Assessments.—It is proposed in the present article, in the first place, to give some account of a tenant's liability under the obligation, now so commonly exacted from him in leases, by which he undertakes to bear the pecuniary burdens imposed on or with regard to the demised premises by public or local authorities.

Some observations will follow on forms of the covenant to pay assessments less stringent in character than those in ordinary use, but still occasionally found in leases or agreements, and also on the covenant to bear them where it is undertaken by the lessor.

In dealing with the matter first alluded to, we have of course nothing to do with those assessments, such as poor rates, assessed taxes, general district rates, &c., which are either personal charges on the occupier, or at all events essentially tenant's payments with which the owner of the premises is not directly concerned. The burdens here referred to are those which are primarily thrown on the owner, but which he is permitted by law to transfer, as a matter of arrangement, to the occupier. There are of course certain assessments, such as property tax and tithe rent charge, in which, as is well known, this is not permitted; and with these also we are consequently not concerned here.

With regard to the others, the payments fall into two classes: first, those that are periodic or recurring, like the land tax; and secondly, definite single sums levied in respect of permanent improvements to property. With regard to the former no difficulty can arise, for it cannot be doubted that these are "rates, taxes and assessments" within the meaning of the ordinary tenant's covenant to defray them. With regard to the others, however, different considerations come in question, and the matter has given rise to considerable difficulty. It is one which has come before the Courts very frequently of late years, in consequence of the number and importance of the modern statutes which have imposed the burdens here spoken of in the interests of the public.

It would not be possible within the limits of the present article to go into the history of the question. It may be said, and indeed it has often been judicially observed, that it is impossible to reconcile all the decisions on the subject. But their tendency has of late years been markedly one in favour of the landlord, on the general ground that the object of the covenant under discussion is to secure to him the agreed rent during the term free from all deductions. It seems clear that some of the earlier decisions, although they have been frequently recognised and acted upon, can now no longer be looked upon as law; yet none of them have been formally overruled—a circumstance which must of course increase the caution of the practitioner in dealing with the matter. It has for a long time been the habit of conveyancers to add to the words "rates, taxes and assessments" in the covenant under consideration certain words of general import. For a long time it was thought that to such words the rule of construction known as that of *ejusdem generis* was applicable, and that as the words "rates, taxes and assessments" were words which properly referred to payments of a recurring kind alone, the general words by which they were followed must have a similar scope, and that they were not apt to include the single payments which are imposed by the modern enactments. It may, however, now be said to be definitely established that the above rule, which is described by Willes, J., in one of the cases (*Thompson* v. *Lapworth*, 1868, L. R. 3 C. P. 149), as "captivating," is no longer applicable in its integrity, and that with regard to four words, at all events, the presence of any of them in the covenant is in itself sufficient to make the tenant liable for the burdens in question. Those four words are—(1) "duties" (*Payne* v. *Burridge*, 1844, 12 M. & W. 727; *Sweet* v. *Seager*, 1857, 2 C. B. N. S. 119; *Budd* v. *Marshall*, 1880, 5 C. P. D. 481; *Clayton* v. *Smith*, 1894, 11 T. L. R. 374; *Brett* v. *Rogers*, [1897] 1 Q. B. 525; *Wix* v. *Rutson*, [1899] 1 Q. B. 474; *Farlow* v. *Stevenson* [1900] 1 Ch. 128); (2) "impositions" (*Foulger* v. *Arding*, [1902] 1 K. B. 700; *In re Warriner*, [1903] 2 Ch. 367); (3) "charges" (*Hartley* v. *Hudson*, 1879, 4 C. P. D. 367; *Smith* v. *Robinson*, [1893] 2 Q. B. 53; *George* v. *Coates*, 1903, 88 L. T. 48); (4) "outgoings" (*Crosse* v. *Raw*, 1874, L. R. 9 Ex. 209; *Aldridge* v. *Ferne*, 1886, 17 Q. B. D. 212; *In re Bettingham*, 1892, 9 T. L. R. 48; *Weld* v. *Clayton District Council*, 1902, 86 L. T. 584; *Greaves* v. *Whitmarsh, Watson & Co.*, 1906, W. M. 1906, p. 132). With regard to the word "assessments" itself the matter is not quite so clear. It is true that, as far as the decisions go in Courts of first instance, it has more than once been held that the rule of *ejusdem generis* does apply to this word, and that, like rates and taxes, it consequently covers only charges of a recurring nature (*Wilkinson* v. *Collyer*, 1884, 13 Q. B. D. 1; *Lyon* v. *Greenhow*, 1892, 8 T. L. R. 457; *Baylis* v. *Jiggens*, [1898] 2 Q. B. 315; *Lumby* v. *Faupel*, 1903, 88 L. T. 562). A distinction, however, seems capable in this respect of being drawn. The single payments here spoken of may either be payments levied in regard to the particular premises demised and no others, as, for example, in the case of the abatement of a sanitary nuisance to a house under the Public Health Acts; or they may be sums apportioned between a number of individuals in respect of premises occupied by them, as in the case of frontagers in a street paved and flagged under the Metropolis Management Acts. In the former case, no doubt, the payment cannot be properly spoken of as an "assessment"; but in the latter it is thought, though the *dicta* on the

subject are very conflicting (see *Payne* v. *Burridge*, *supra*; *Thompson* v. *Lapworth*, 1868, L. R. 3 C. P. 149; *Hartley* v. *Hudson*, *supra*), that it can strictly and properly be defined by that word; and in the last case on the subject (*Lumby* v. *Faupel*, 1904, 90 L. T. 140) the Court of Appeal expressly declined to adopt the view upon which the Court of first instance, following the earlier decisions, had acted, contenting itself, after much argument on the matter, with affirming that judgment on a different ground. It is therefore submitted that, so far as this class of payments is concerned, the question may to a certain extent be described as still open.

Another very common addition introduced by conveyancers into the covenant consists, after the words "imposed in respect of the demised premises," of the expression, "or on the landlord in respect thereof," or "or on any person in respect thereof," or "or payable by the landlord or tenant thereof," or some other phrase of that type. The reason why these expressions were first introduced appears to have been that none of the statutes which, like the Public Health Acts, impose liabilities directly on the owner of premises, then existed, all of them which, like the Land Tax Act (38 Geo. III. c. 8, s. 17), struck at the owner at all, striking at him through his tenant. The way adopted was to make the tenant, to the exclusion of the landlord, directly liable, and then to permit him to deduct the payment he made from his rent, unless he had entered into a contract or covenant not to do so. The covenant was consequently introduced with the sole object of preventing this deduction; and it was decided that it did not apply to render the tenant liable when he had merely undertaken to make money payments, and the payment which it was sought to exact from him was imposed by the statute directly upon the owner, even though that statute permitted him to be resorted to in the first instance for purposes of collection (see *Tidswell* v. *Whitworth*, 1867, L. R. 2 C. P. 326). The expressions above spoken of began then to be commonly inserted in the covenant, and these expressions were formerly considered to be very important in effecting the transfer of liability from the landlord to the tenant. According, however, to the latest decisions, it seems to be quite clear that when one of the four words, "duties," "impositions," "charges," or "outgoings," occurs in the covenant, they are quite unnecessary to make the tenant liable (see *Foulger* v. *Arding*, [1902] 1 K. B. 700, *per* Collins, M.R.).

In consequence of what has been already stated, most leases now contain one or more of the four words above mentioned, but as this is not always the case, the question, perhaps, may still have to be considered what other words will suffice for the purpose of transferring the liability in question. Occasionally, the general words one meets with beyond "rates, taxes and assessments" are "sums of money," "expenses," "demands," etc. No positive answer can at present be given to this question. It is, however, thought that if with one of the above general words there is conjoined the expression "imposed in respect of the premises," the tenant would be rendered liable on the ground that sums of money imposed are in effect the same as impositions (see *George* v. *Coates*, 1903, 88 L. T. 48). If, however, the lessee has only undertaken to defray sums of money, etc., "payable in respect of the premises," it is possible that without the expression "or by the lessor in respect thereof" he would escape liability. At all events, the expression

cannot be regarded as entirely inefficacious, for where a lessee covenanted to pay all rates, etc., imposed on the premises, or on the landlord in respect thereof, it was held that a rate which, though primarily a tenant's rate, became under special circumstances payable by the landlord was within it (*Parkinson* v. *Potter*, 1885, 16 Q. B. D. 152).

Reference should perhaps here be made to a distinction which was first set up in the case of *Tidswell* v. *Whitworth*, 1867, L. R. 2 C. P. 326, and though it has been disregarded in subsequent cases, has never been formally discarded or overruled. The distinction is one between statutes under which the primary duty of the landlord is to do certain work himself, the power of the public authority to do the work, and the resulting liability of the landlord to pay the money, arising only upon his own default, and those where his primary duty is merely that of paying money to the authority in respect of work done by the latter to the premises. The nuisance sections of the Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 94-98, may be taken as an instance of the one class, and the paving section of the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, s. 105, as one of the other. It was formerly thought that payments made by a landlord under the former kind of statute, as distinguished from those under the latter, were mere payments in the nature of a penalty in respect of the landlord's neglect to perform his duty, and were not payments "in respect of the premises" within the covenant at all, and that for such payments the tenant was consequently free from liability (*Tidswell* v. *Whitworth*, *supra*). It has, as just stated, apparently never been actually laid down that the distinction in question is one that is unsound, but the more modern authorities give it the go-by altogether (see *Weld* v. *Clayton District Council*, 1902, 86 L. T. 584).

The landlord may, in the case here spoken of, adopt one of two courses. He may either do the work himself in obedience to the order of the authority, or suffer it to be done by them and make the necessary payment afterwards. In either case the tenant's liability under his covenant is unaffected. Where, however, he does the work himself, he must do it under the legal order of the public authority, or the disbursement which he is called upon to make will, as against the tenant, be a voluntary payment, and not recoverable from him under the covenant (see *Harris* v. *Hickman*, [1904] 1 K. B. 13).

It ought further to be observed that where the outgoings which the lessee covenants to pay are those "chargeable upon the premises or the owner," only those payments are included which become chargeable during the term. The mere fact that the money becomes payable after the commencement of the lease is immaterial where the payment is chargeable before it (*Surtees* v. *Woodhouse*, [1903] 1 K. B. 396). Similarly, where the covenant refers to payments which during the term may be imposed or assessed upon the premises or on the landlord or tenant in respect thereof, payments chargeable upon the premises before the term began are not within its scope (*Lumby* v. *Faupel*, 1904, 90 L. T. 140). It may be added that a covenant to make payments charged upon or assessed *on the premises* does not extend to those which are imposed on the lessor by a merely personal order, but includes only those legally charged on them (*Allum* v. *Dickinson*, 1882, 9 Q. B. D. 632).

It should also be noticed that the liability of the tenant under the

covenant in question may be displaced if it can be shown by reference to other parts of the lease that the words upon which that liability depends must have a more restricted meaning than is usually the case. Where, for example, a lessee, after the usual covenant to pay "outgoings," undertook by a further and separate covenant to pay a fair proportion of all expenses which the lessor as such might have to pay by virtue of any Act of Parliament, it was held that the word "outgoings" in the first covenant meant only those of a recurring nature, and that a payment which fell within the latter clause was not such an outgoing at all (*Arding* v. *Economic Printing Co.*, 1898, 79 L. T. 420, 622).

It has been laid down in one of the latest authorities that however wide the words of the covenant may be, they can only refer to matters which may reasonably be supposed to have been within the contemplation of the parties to the demise (*Foulger* v. *Arding*, [1902] 1 K. B. 700). What the precise application of this principle may be does not seem altogether clear. It has been twice decided that the length of the term is for this purpose to be taken into account, and that in the case of a tenancy from year to year the lessee may be free from liability for outgoings incurred in respect of work for which in a lease for years he would have been liable (*Valpy* v. *St. Leonards Wharf Co.*, 1903, 1 L. G. R. 305; *Harris* v. *Hickman*, [1904] 1 K. B. 13). On the other hand, it is quite settled that in a three years' agreement such an element cannot be taken into consideration (*Batchelor* v. *Bigger*, 1889, 60 L. T. 416; *In re Warriner*, [1903] 2 Ch. 367; *Stockdale* v. *Ascherberg*, [1904] 1 K. B. 447); and it is thought that the only material element in deciding whether the expenditure was within the reasonable contemplation of the parties is the nature of the work in respect of which it was incurred.

Something must be said in this connection with regard to a form of modern statutory enactment which has already given rise to considerable trouble in the Courts. The enactment here referred to is the one first provided by the Factory and Workshops Act, 1891, 54 & 55 Vict. c. 75, s. 7, now repealed, but re-enacted by the Factory and Workshops Act of 1901, 1 Edw. VII. c. 22, s. 14, by which provision is made for the apportionment of expenses involved in the execution of work upon premises to secure means of escape in case of fire. And as a similar provision is now (by the London Building Act of 1905, 5 Edw. VII. c. ccix. s. 20) applied throughout the metropolis to private buildings which fulfil certain requirements therein laid down, the matter has become one of considerable importance.

The general scheme of this legislation is to impose the duty of executing the necessary work on the owner of the premises; and then follows the provision that where the owner alleges that the occupier or other person entitled to some estate or interest in the building affected should bear or contribute to the expense which may be involved, he may apply to the County Court having jurisdiction, and that Court, after hearing the parties, may make such order as appears to be just and equitable under all the circumstances of the case. Singularly enough, the legislature has omitted altogether to take into account the covenant —common as it is—with which we are here concerned, or afforded any inkling as to how far the statute should apply to or control the covenant where it exists. And this is the more remarkable, because one finds in the immediately preceding clause of the same section of the statute (the Factory Act, 1901, s. 14), that power to comply with its requirements is

expressly given to the owner *notwithstanding any agreement* with the occupier. The result has been seen in judicial decisions which, although the enactments in question have been only a short time in operation, are already greatly in conflict.

In the first case on the subject which came before the Courts (*Arding* v. *Economic Printing Co.*, 1898, 79 L. T. 420, 622), the point which has given rise to all the trouble, strange as it may appear, was not taken at all, although the case was carried from the County Court to the Divisional Court, and thence to the Court of Appeal; and the decision which has already been referred to (*supra*) seems to have turned entirely on the meaning of the word "outgoings" in the general covenant by the tenant, when that covenant was itself controlled by a further covenant, under which he undertook to bear a portion of the expenses of works executed in compliance with an Act of Parliament.

It was in the case of *Monk* v. *Arnold*, [1902] 1 K. B. 761, that the question seems to have been first raised. In that case, which was decided by the King's Bench Division, an application had been made under the Factory Act to the County Court, which had apportioned the expenses of the work done between the two parties in a certain manner, and both of them appealed from the decision—the landlord, on the ground that as the tenant had entered into a covenant to pay all "impositions and outgoings," he was liable for the whole expense without apportionment; whilst the tenant contended that, on the true construction of the covenant, he was free from all liability. The Court, dismissing both appeals, held that the County Court had jurisdiction under the statute to do what it considered just and equitable, whatever the true construction of the covenant might be. The next decision was in the case of *Shephard* v. *Barber*, 1902, 1 L. G. R. 157, in which the landlord, who had been called upon to incur expenses of the kind now spoken of, instead of going to the County Court sued the tenant on his covenant to pay impositions in the High Court, and it was held by Lawrance, J., that the tenant was liable.

In the subsequent case, however, of *Horner* v. *Franklin*, [1904] 2 K. B. 877, where similar circumstances came in question, the landlord's action on the covenant in the High Court was dismissed by Darling, J.; a decision which was confirmed by the Court of Appeal ([1905] 1 K. B. 479). It was there held that it was the intention of the statute to impose the duty in question upon the owner of the premises, except in so far as he could get relief in the County Court, that the ultimate liability should not be determined entirely by the terms of the tenancy, and that unless the jurisdiction of the High Court were ousted there would be two Courts applying different standards to the same matter. The Court appear to have approved the views on the statute expressed by Channell, J., in *Monk* v. *Arnold*, *supra*, where he distinguished covenants which specifically mentioned the expenditure in question from those in which general terms, though sufficiently wide to include it, were alone used. It was suggested that whilst in the former case it would not be right to interfere with the express agreement of the parties, in the latter it would be just and equitable for a County Court to take into consideration all the circumstances of the case.

In the meanwhile, before the decision of the Court of Appeal in *Horner* v. *Franklin*, two cases had been decided by the King's Bench

Division, which call for notice here (*Goldstein* v. *Hollinsgworth*, [1904] 2 K. B. 578; *Morris* v. *Beal*, *ibid.* 585). They were decisions under another section of the Factory Act of similar import. By sec. 101 of that Act it is provided that where premises have been let as a bakehouse, and structural alterations are required in order that the certificate made necessary by that Act should be obtained, the occupier, if he alleges that the owner should bear the whole or part of the expenses, may go to a Court of summary jurisdiction for such order of apportionment as appears to the Court to be just and equitable under the circumstances of the case, regard being had to the terms of any contract between the parties, and in the alternative the Court may, at the request of the occupier, determine the lease. In both the above cases the lessee had entered into a covenant to pay outgoings, and having been refused the requisite certificate unless structural alterations were carried out on the premises, applied to a magistrate under the enactment. It was held by the Court that as the amount of any apportionment made upon the owner could be recovered by him in an action upon the covenant, the magistrate had no jurisdiction to make an order for contribution in such case by the owner. It seems to be difficult to reconcile this view with the *ratio decidendi* of *Horner* v. *Franklin*, *supra*, though attention may be drawn to the fact that the enactment as to bakehouses differs to some extent from the one as to providing means of escape from fire, by expressly directing that the Court of summary jurisdiction is to have regard to the terms of any contract between the parties, and also by giving to the occupier the power to determine the lease. In *Horner* v. *Franklin*, Romer, L.J., expressly reserved the right to consider the grounds of both the above-mentioned decisions if necessary hereafter.

In the last reported case, however, on the subject, that of *Stuckey* v. *Hooke*, 1905, 3 L. G. R. 633, it was held by Warrington, J., that those decisions were binding upon him; but his judgment was reversed in the Court of Appeal (22 Times L. R. 508), where it was pointed out that there is no essential difference between the two classes of enactments here referred to. In this case, after the Court of summary jurisdiction had apportioned the expenses, the landlord executed the work and sought to recover the whole of its cost from the tenant in the High Court, on the covenant to pay outgoings into which he had entered. It was held by the Court of Appeal that the matter was governed by their previous decision in *Horner* v. *Franklin;* that no action would lie on the covenant in the High Court, because the Court of summary jurisdiction was made the statutory arbitrator to decide how the expense of structural alterations in the premises should be borne between the parties; and that there was nothing inconsistent with *Horner* v. *Franklin* in the actual decisions of the Divisional Court. But that the grounds (already referred to) of those decisions are so inconsistent is, as it is thought, quite apparent; and with regard to *Morris* v. *Beal*, at all events, where the Divisional Court reversed the finding of the magistrate, it is difficult to see how the judgment can be supported. On the whole, it will be seen that there is much ground for saying that the decisions on this somewhat unhappily worded enactment are at present in a state of considerable confusion, and probably the last word has by no means yet been said on the subject.

It has already been mentioned that occasionally forms of the covenant are met with in leases which are far less stringent in their character than

those which have hitherto been dealt with. Undertakings simply to pay all "taxes, parliamentary, parochial, or otherwise," may be taken as a fair type of this form of obligation. In these cases we have of course no concern with those essentially landlord's burdens which, as has already been seen, may be thrown upon the tenant by the employment of words like "impositions" or "outgoings." A parliamentary tax has been defined as one which is imposed and assessed directly by Act of Parliament (*Palmer* v. *Earith*, 1845, 14 M. & W. 428; 69 R. R. 715), and it is one, moreover, imposed, as it has been said, for the benefit of the whole kingdom (see *Guardians of Bedford Union* v. *Commissioners of Bedford*, 1852, 7 Ex. 777). Where an Act of Parliament, for instance, was passed merely to provide a more convenient mode of raising a tax which was already in existence, and the Act merely regulated its collection, it was held that the tax was not a "parliamentary tax" within the meaning of the covenant (*Baker* v. *Greenhill*, 1842, 3 Q. B. 148). The word "taxes" of itself refers *primâ facie* to those of a parliamentary kind, which are consequently included within it (*Arran* v. *Crisp*, 1694, 12 Mod. 54; *Brewster* v. *Kitchin*, 1697, 1 Lord Ray. 317). It follows that where a tenant covenants to pay "taxes" generally, the burden of the land-tax, which as between the parties is primarily payable by the landlord (38 Geo. III. c. 5, s. 17), falls upon him (*Amfield* v. *White*, 1825, Ry. & Moo. 246; 27 R. R. 745; *Manning* v. *Lunn*, 1845, 2 C. & K. 13; 80 R. R. 822); and where a tenant agreed to pay "taxes or assessments" it was held that he was liable for that tax, even though it had been redeemed by a former lessee, and had become in consequence payable as a rent-charge to him (*Governors of Christ's Hospital* v. *Harrild*, 1841, 2 M. & G. 707; 58 R. R. 546). The expression "taxes" also includes the poor rate (see *Mitchell* v. *Fordham*, 1827, 6 B. & C. 274).

A few observations may be added with regard to the case, which is, perhaps, comparatively rare, though by no means unknown, where a direct obligation to pay rates, taxes, or assessments is imposed by the instrument of demise on the lessor. Where in such a case improvements have been made to the premises in consequence of which the rates and taxes may be increased, the landlord is not, without special stipulation to that effect, liable for the increased amount, nor does it make any difference if, by the wording of his covenant, taxes to be charged, as well as those already charged, are expressly mentioned (*Graham* v. *Wade*, 1812, 16 East, 29; *Watson* v. *Home*, 1827, 7 B. & C. 285; 31 R. R. 200; *Smith* v. *Humble*, 1854, 15 C. B. 321). And the same rule applies in the case of those assessments which are essentially landlord's burdens, where the instrument of demise is silent altogether with respect to them. The lessor in this case discharges his obligation if he pays the assessment on the rent which, under the terms of the demise, is paid to him, and for any excess which may arise in consequence of the improved annual value of the premises, the lessee, notwithstanding the obligation undertaken by, or falling upon, the lessor, will be liable (see *Yaw* v. *Leman*, 1743, 1 Wils. 21; *Hyde* v. *Hill*, 1789, 3 T. R. 377; *Whitfield* v. *Brandwood*, 1818, 2 Stark. 440; 20 R. R. 712; *Watson* v. *Atkins*, 1820, 3 B. & A. 647). Assessments essentially payable by the tenant, such as poor rates, being merely personal charges on the occupier of premises, will not fall upon the landlord, even though he may have entered into a covenant to pay all taxes on the lands demised (*Theed* v. *Starkey*, 1724, 8 Mod. 314). A covenant, moreover, by him to bear and pay assess-

ments which may be "imposed" on or in respect of the premises applies only to those of a compulsory nature, and will not render him liable for so-called water "rates" (*Badcock* v. *Hunt*, 1889, 22 Q. B. D. 145). And a covenant by him to pay all water rates "imposed or assessed upon the premises or on the lessor or lessees in respect thereof" has been held to be confined to water supplied to the lessees for domestic as distinguished from trade purposes, even though the premises were, to the knowledge of the lessor, expressly taken by the lessees for the purposes of trade (*Floyd* v. *Lyons*, [1897] 1 Ch. 633).

It may be added that where the lessor has expressly undertaken to bear an assessment, the lessee after paying it may sue to recover it by action (see *Watson* v. *Home*, *supra*); or he may, if he please, deduct the amount from his rent (see *Graham* v. *Tate*, 1813, 1 M. & S. 609), and this latter course he must adopt in the more frequent case where he pays the landlord's assessment and there is no covenant in the lease relating to the matter at all. For the landlord is not in this event primarily liable, and the deduction in question has to be made under the express terms of the statute imposing the assessment, though to this rule an exception may be made where the tenant is deprived of the opportunity of deducting by reason of his quitting the premises before the demand for the assessment is made (*Dawson* v. *Linton*, 1822, 5 B. & A. 521). The deduction in question, it may be mentioned, must always be made from the instalment of rent which becomes payable next after the payment of the tax, otherwise the payment of the full rent, so far as the amount of the tax is concerned, becomes a voluntary payment, and cannot be recovered either by action or in any other manner (*Denby* v. *Moore*, 1817, 1 B. & A. 123; 18 R. R. 444; *Andrew* v. *Hancock*, 1817, 1 B. & B. 37; 21 R. R. 569; *Stubbs* v. *Parsons*, 1820, 3 B. & A. 516; *Spragg* v. *Hammond*, 1820, 2 B. & B. 59; *Cumming* v. *Bedborough*, 1846, 15 M. & W. 438; 71 R. R. 718; *Dawes* v. *Thomas*, [1892] 1 Q. B. 414). Where, however, the payment in question is made under a distress for the whole rent, or under protest with the object of preventing a distress, such payment is not voluntary, and the rule does not apply (*Graham* v. *Tate*, 1813, 1 M. & S. 609; *Baker* v. *Greenhill*, 1842, 3 Q. B. 148; 61 R. R. 173). Where, on the other hand, a tenant during a long course of years deducted from his rent certain sums in respect of landlord's taxes, more than the latter was liable to pay, and the landlord permitted this with full means of knowledge of that fact, it was held that he could not afterwards recover the sums which had been so allowed in error (*Bramston* v. *Robins*, 1826, 4 Bing. 11). Where a tenant pays a landlord's assessment, such payment operates *pro tanto* as a payment of rent, and can if necessary be so pleaded by him (see *Franklin* v. *Carter*, 1845, 1 C. B. 750).

Most of the statutes above spoken of, which sanction a deduction by the tenant of a landlord's assessment from his rent after it has been paid by him, contain a proviso that nothing therein contained shall affect any contract between landlord and tenant. Difficulties have often arisen as to the effect of such a clause. It has been held that a mere undertaking by a tenant to pay rent without any deduction does not deprive him of the right to deduct he may have under an existing statute containing such a provision, because the contracts alluded to are those which relate directly to the particular rights of the landlord and tenant under the statute (*Home and Colonial Stores* v. *Todd*, 1891, 63 L. T. 829). But where a statute, enacting in the usual manner that a land-

lord's assessment should be primarily payable, at the option of a local authority, by the tenant, who should have the right of deduction now spoken of "as if the same had been actually paid as part of such rent," was followed by the proviso in question, it was held that the tenant was not entitled to deduct the amount he had paid from his rent, and that the landlord had the right to levy a distress for the part of the unpaid rent which was equivalent in amount to the deduction (*Skinner* v. *Hunt*, [1904] 2 K. B. 452).

Where a lease contained a covenant by the tenant to pay rent without deducting taxes, it was held that a subsequent statute, by merely containing a clause authorising the deduction to be made, did not repeal the covenant (*Brewster* v. *Kitchin*, 1697, 1 Lord Ray. 317). Moreover, a covenant to pay rent free from rates and taxes will not, as it has been held, apply to assessments different in nature from those subsisting at the time it is entered into (*ibid.*; *Vestry of Mile End* v. *Whitby*, 1898, 78 L. T. 80). The covenant in question, however, is generally framed so as to extend to future as well as to present outgoings; but the lessee will not by entering into such an obligation render himself responsible for assessments which have actually become payable at the date of the instrument of demise (see *Surtees* v. *Woodhouse*, [1903] 1 K. B. 396).

Lastly, statutes are occasionally met with which, after providing for the abolition of immunity of property from the payment of certain rates, enact that the tenant shall be entitled to deduct a certain proportion of such payment from his rent unless he has "specifically contracted" to pay such rate in the event of the abolition of the exemption; and it has been held that a mere general covenant by him to pay all assessments is not sufficient to deprive him of the right of deduction, as some specific reference to the possible abolition of the exemption by Parliament is necessary for that purpose in the instrument of demise (*Devonshire* (*Duke of*) v. *Barrow Steel Co.*, 1877, 2 Q. B. D. 286; *Chaloner* v. *Bolckow*, 1878, L. R. 3 App. Ca. 933).

(See also OUTGOINGS.)

Assessors.—*House of Lords.*—The House may, in appeals (*q.v.*) in Admiralty actions, call in the aid of one or more assessors, and hear such appeals wholly or partially, with the assistance of such assessors (54 & 55 Vict. c. 53, s. 3).

Privy Council.—The King in Council may make rules for the attendance on the hearing of ecclesiastical cases by the Judicial Committee of archbishops and bishops as assessors (39 & 40 Vict. c. 59, s. 14, and *Rules made by Order in Council, 15th November* 1876, 2 P. D. 384 [Stat. R. & O. Rev. 1904, vol. vi. *Judicial Committee*, p. 114]; and see *Read* v. *Bishop of Lincoln*, [1892] A. C. 644). Assessors may also be called in aid in patent cases (46 & 47 Vict. c. 57, s. 28).

The Court of Appeal and High Court may in any cause or matter call in the aid of one or more assessors (36 & 37 Vict. c. 66, s. 56; R. S. C., Order 36, rr. 7 and 43; Order 68, r. 1). [The remuneration, if any, to be paid to the assessors is determined by the Court (36 & 37 Vict. c. 66, s. 56).] Special provision is made for assessors in patent cases by the Patents Act, 1883, 46 & 47 Vict. c. 57, s. 28.

In the Admiralty Division, the Elder Brethren of Trinity House are commonly employed as nautical assessors (see Williams and Bruce,

Admiralty Practice, 3rd ed., p. 442). (See TRINITY HOUSE.) Their duty is to aid the judge by answering any questions he may put as to nautical skill and experience. They take no part in the judgment, for which the judge alone is responsible (*The Beryl*, 1884, 9 P. D. 137; 53 L. J. P. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. 321).

The Elder Brethren may also be employed as assessors on appeals in the High Court from the County Court in cases heard in the County Courts by a judge and nautical assessors (51 & 52 Vict. c. 43, s. 125).

County Courts.—The judge, on the application of either party, may in any case summon to his assistance one or more assessors (51 & 52 Vict. c. 43, s. 103, and Order 21 of the County Court Rules, 1889).

In employers' liability cases the assessors have only to ascertain the amount of compensation (43 & 44 Vict. c. 42, s. 86; County Court Rules, 1889, Order 44). [See further, EMPLOYERS' LIABILITY.]

In Admiralty cases in the County Courts, the judge may be assisted by two nautical assessors or by two mercantile assessors (31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51, s. 5).

If one party asks for a jury and the other party for assessors, the trial must be by judge and assessors (*The Tynwald*, [1895] P. 142; 64 L. J. P. 1; 43 W. R. 509; 71 L. T. 713).

Courts of Survey consist of a judge sitting with two surveyors as assessors (57 & 58 Vict. c. 60, ss. 487, 488. See secs. 459, 466, 467, and Shipping Casualties Rules, 1895, as to appointment and duties of assessors for the Court of Survey; sec. 490 as to scientific referees; sec. 548 as to assessors on summary determination of disputes as to salvage; and sec. 610 as to assessors on appeals by pilots from suspension or dismissal).

In the *Ecclesiastical Courts*, assessors sit with the Bishop in proceedings under the Church Discipline Act, 1840, 3 & 4 Vict. c. 86, s. 1, and with the Chancellor to determine questions of fact in proceedings under the Clergy Discipline Act, 1892, 55 & 56 Vict. c. 32, ss. 2 and 3, and Stat. R. & O. Rev. 1904, vol. iv. *Ecclesiastical Court, E.*, pp. 61-109. As to the jurisdiction of the Archbishop sitting with assessors, see *Read* v. *Bishop of Lincoln*, 1889, 14 P. D. 88; 61 L. T. 402; Phillimore's *Ecclesiastical Law*, 2nd ed., p. 73.

Assets.—The word "assets" is a form of the French word "*assez*," *enough*, and is usually employed to signify the estate of a deceased person, *sufficient* to satisfy his debts, though sometimes applied more generally to express any distributive estate, whether the owner is deceased or not. But all property in the hands of an executor is not necessarily assets. Thus, while an advowson is assets, the right of presentation to a living vacant at the death of the testator, by reason of its not being vendible, is not assets. See ADVOWSON.

Assets, in the ordinary sense, are divisible into two classes—legal and equitable. Legal assets are those which creditors could make available for the payment of debts in a Court of law; equitable assets are those which could be made available for that purpose only through a Court of equity. Legal assets comprise everything that comes to an executor or administrator *virtute officii*, or, in other words, such property as would have come to the executor, as such, if the testator had by his will merely appointed him executor and said nothing further about the disposition of his property, or to the administrator on an intestacy (*Cook* v.

Gregson, 1856, 3 Drew. 547; 61 E. R. 1012; *Bain* v. *Sadler*, 1871, L. R. 12 Eq. 570). The remedy of the creditor, whether legal or equitable, and not the remedy of the executor, or the legal or equitable nature of the property, determines whether the assets are legal or equitable. Thus the portions of younger children charged on the family estate are generally only recoverable in equity, but they are legal and not equitable assets (*A.-G.* v. *Brunning*, 1860, 8 H. L. C. 242; 11 E. R. 421); [as is also an equity of redemption in freeholds or leaseholds (Seton, 6th ed., 1423); and now since the Land Transfer Act, 1897, it would appear that real estate is legal assets in the hands of the executor (60 & 61 Vict. c. 65, s. 2 (3). See *re Cary and Lott*, [1901] 2 Ch. 463)].

[It has only been by a number of statutory enactments passed at considerable intervals of time that real estate has become assets for the payment of debts generally.] Down to a comparatively recent date, although freeholds which had descended to the heir, or had been devised without provision for payment of debts, were liable to the specialty debts of the deceased, simple contract creditors had no remedy against them, and copyholds were not liable to either class of creditors. But by Lord Romilly's Act, 1833, 3 & 4 Will. IV. c. 104, all estates and interests in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which any person dies seised of or entitled to, and which he has not by his will charged with or devised subject to the payment of his debts, are made assets to be administered in Courts of equity for payment of both specialty and simple contract debts (*In re Illidge; Davidson* v. *Illidge*, 1884, 27 Ch. D. 478). The Act gave, however, a priority to specialty creditors, which was abolished by 32 & 33 Vict. c. 46, whereby all the creditors of a deceased person, as well specialty as simple contract, were put on an equal footing as to payment out of the assets, whether legal or equitable, but without prejudice to any lien, charge, or other security. [The result of these enactments may be stated shortly to have been that, prior to the Land Transfer Act, real estate had become legal assets, but in the hands of the heir or the devisee.]

After payment of the funeral expenses and testamentary expenses, including the costs of an administration action (see *Penny* v. *Penny*, 1879, 11 Ch. D. 440), which are entitled to priority out of both legal and equitable assets, creditors as between themselves are entitled to payment out of legal assets in the following order:—(1) Debts due to the Crown by record or specialty, and a surety to the Crown, who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of the principal's estate (see *In re Lord Churchill; Manisty* v. *Churchill*, 1888, 39 Ch. D. 174); (2) debts to which priority is given by particular statutes; (3) judgments in Courts of record against the deceased in his lifetime, rateably, but they must have been registered under 23 & 24 Vict. c. 38, s. 3 (as to what are judgments, see Seton, 6th ed., pp. 186, 2070); (4) judgments against the executor or administrator, whether registered or not, according to priority of date; (5) recognisances and statutes (see Williams, *Executors*, 10th ed., p. 767); (6) specialty and simple contract debts, and unregistered judgments against the deceased; (7) voluntary covenants and bonds.

Before judgment for administration has been made, an executor or administrator has the right, out of legal assets, to prefer one creditor to

another, though of equal degree. An order for an account, under R. S. C., Order 15, but not directing application of the assets in a due course of administration, does not affect this right (*In re Barrett, Whitaker* v. *Barrett*, 1890, 43 Ch. D. 70). An executor or administrator has the right to retain his own debt out of legal assets in priority to all other creditors of equal degree, and this right is not affected by judgment for administration, but cannot be exercised after the appointment of a receiver out of assets got in by him (*In re Jones, Calver* v. *Laxton*, 1885, 31 Ch. D. 440; and see *In re Wells, Molony* v. *Brooke*, 1890, 45 Ch. D. 569). Administration will not now be granted to a creditor except upon his entering into a bond to pay all debts, his own included, *pro ratâ* (*In the goods of Brackenbury*, 1877, 2 P. D. 272); [but this does not prevent the executor from exercising his right of retainer (*Davies* v. *Parry*, [1899] 1 Ch. 602; *re Belham*, [1901] 2 Ch. 52].

Interests in lands devised for, or charged with payment of the testator's debts, though the devisees or persons to sell are executors, are equitable assets (*Silk* v. *Prime*, Dick, 384). [As to what constitutes a charge of debts, see tit. EXECUTORS and ADMINISTRATORS. *Sale by Executors under Charge of Debts.*] The separate estate of a married woman, married before 1883, is distributable as equitable assets (*In re Poole; Thompson* v. *Bennett*, 1877, 6 Ch. D. 739). [See HUSBAND AND WIFE.]

Equitable assets are distributable *pari passu* among all creditors [subject to the priority of the Crown, see *re Henley*, 9 Ch. D. 469, *sed quære*], since "equality is equity." An executor or administrator has no right of retainer out of equitable assets; and a trustee of an estate devised to him for the purpose of paying debts has no right of retainer thereout, whether he is executor or not (*Bain* v. *Sadler*, 1871, L. R. 12 Eq. 570).

Assets are, as between beneficiaries entitled to them under a will, liable for payment of debts in the following order, subject to any special directions in the will:—

1. The general personal estate not specifically bequeathed or exonerated (legal assets);

2. Real estate devised in trust for payment of debts (equitable assets) [but see *re Kempster*, [1906] 1 Ch. 446];

3. Real estate descended, whether freehold or copyhold (legal assets);

4. Real estate, including copyhold, devised, charged with the payment of debts (equitable assets) [not altered by the Land Transfer Act, 1897, *re Kempster*, [1906] 1 Ch. 446];

5. General pecuniary legacies;

6. Specific and residuary devises and specific bequests, *pro ratâ* (legal assets; and see *Lancefield* v. *Iggulden*, 1874, L. R. 10 Ch. 130);

7. Real and personal estate appointed under a general power [*Beyfus* v. *Lawley*, [1903] A. C. 411]. See POWERS.

Where the assets are in the first instance not applied in the order above given, the estate remaining after payment of creditors will be marshalled so as to adjust the rights *inter se* of the persons beneficially interested. A pecuniary legatee is entitled to stand in the place of a creditor against real estate charged with debts (*re Salt; Brothwood* v. *Keeling*, [1895] 2 Ch. 203; *re Roberts*, [1902] 2 Ch. 834). Marshalling

between legal and equitable assets may also be required, so that creditors who have been partly paid out of legal assets may bring the amount into hotchpot as a condition to receiving further payment out of equitable assets. The Court will also marshal as between legatees, when some of the legacies are charged on the real estate and some not. Under the former law relating to mortmain (*q.v.*) the Court would not (unless the testator so directed) marshal in favour of charitable legacies, so as to reserve the pure personal estate for their payment, but the recent Act (54 & 55 Vict. c. 73) has rendered this doctrine unimportant (and see *In re Hume; Forbes* v. *Hume*, [1895] 1 Ch. 422, 425 *et seq.*). [As to MARSHALLING generally, see that heading.]

If an executor or administrator admits assets for the payment of debts or legacies, he becomes personally liable to the creditor or legatee (see 2 Seton, 6th ed., pp. 1484-5).

As to refunding assets in favour of creditors, or legatees and next-of-kin, see 2 Seton, 6th ed., pp. 1660-1662; and as to foreign assets and the jurisdiction relating thereto, see *ibid.*, pp. 1586-1588.

The administration by the Court of the assets of a debtor who has died insolvent is now regulated by the bankruptcy law (see Judicature Act, 1875, s. 10; Bankruptcy Act, 1883, ss. 9 (2), 37, 168; Sched. 2, rr. 9-17).

In the administration of the English assets of a person domiciled abroad, no priority is given to English over foreign creditors (see *In re Kloebe; Kannreuther* v. *Geiselbrecht*, 1884, 28 Ch. D. 175).

[*Authorities.*—Story's *Equity Jurisprudence;* Williams on *Executors;* Jarman on *Wills*, 5th ed.]

Assignment.—For the various forms of Assignment, *e.g.* of COPYRIGHT DESIGNS, etc., see these and similar headings.

Assignment of Action or Matter to a Judge, Chancery Division.—Prior to the Rules of the Supreme Court, 1883, a plaintiff or applicant in any action or matter in the Chancery Division was required to mark his writ, or originating summons, with the name of the judge to whom he elected to assign the cause. The Chancery General Order of May 1837, Order 2, imposed this duty on the plaintiff to a cause commenced by bill of complaint, and the same practice was followed in the case of every other document originating proceedings in the Court. This practice was retained by sec. 42 of the Judicature Act, 1873 (since repealed), and continued till 1883, when the existing code of rules came into operation. Order 5, r. 9, took away from a plaintiff or applicant the right to choose his own judge, and substituted therefor the assignment of the action or matter by ballot, subject only to the proviso that, "where a cause or matter has been assigned to one of the said judges (Chancery Division), every subsequent writ, summons or petition relating to the administration of the same trust, or winding-up of the same company, or so connected therewith as to be conveniently dealt with by the same judge," should be marked with the name of such judge upon the certificate of the solicitor of such connection with the previous cause or matter, countersigned by the Chancery Master. See *Form, infra.*

The assignment to a judge by ballot is made in the case of all originating Chancery proceedings (see ACTIONS AND MATTERS IN THE

HIGH COURT), except petitions, at the Writ, etc., Department, Central Office, by the proper officer at the time of the issue or filing, as the case may be, of the originating proceeding. In the case of originating petitions, the assignment is made in the same way by the clerk to the Chancery registrars. In Chancery actions commenced in a district registry (see DISTRICT REGISTRIES), the assignment is made by the district registrar. Where the action or matter is assigned to a particular judge by the certificate of its connection with another case previously dealt with by him, the filing of the certificate is the authority for making such assignment independently of the ballot.

Separate ballots are kept for writs of summons, for originating summonses, for originating motions, and for petitions.

The purpose of this method of assignment was to ensure, as far as possible, an equal distribution of business among the several judges; and to secure the fulfilment of this purpose a particular kind of ballot had to be used, which may be described as ballot in rotation. Each ballot-box contains for the first drawing six tablets, each bearing the name of one of the existing Chancery judges. The first name drawn is marked on the first action by a corresponding seal, and the tablet of that judge is kept out of the ballot-box; and so with each successive assignment until the ballot-box has been emptied, when all the tablets are returned to the box to be drawn out over again as successive actions are presented for assignment.

From 1883 to 1901 the effect of this mode of assignment was to attach the action or matter to the particular judge whose name was sealed on the document whereby it was originated, and had to be dealt with by him, and became attached to his successor in office. This, however, was subject to the power of the Lord Chancellor to make orders from time to time for the transfer of actions and matters from one judge to another.

In 1901 this ceased to be the precise effect of the assignment. By the Rules of the Supreme Court, November 1900, which came into operation on January 11, 1901, a new system for dealing with the Court and Chamber business of the Chancery Division was inaugurated, whereby the six Chancery judges were divided for working purposes into three separate pairs of judges, each judge of each pair having full authority to deal with all actions and matters, at all stages thereof, which were assigned to the other judge thus linked with him for working purposes. Thenceforth each pair of judges so linked together had one set of chambers attached to that pair, each judge having equal jurisdiction to deal with the other's actions. The general effect of this change is dealt with under CHAMBERS, CHANCERY DIVISION (*q.v.*), and it is here referred to only for the purpose of showing the precise effect of the prescribed assignment of an action or matter to a judge under Order 5, r. 9. Such assignment no longer means that the judge to whom the action is assigned will either try the action or dispose of it in chambers, for that no longer depends on the assignment, but solely on the arrangement existing for the time being for the disposal of Court, or chamber, business between the judge to whom the action or matter is assigned and the judge with whom he is linked for working purposes. (See CAUSE LIST.) In effect, the assignment (*e.g.*) to Kekewich, J., is an assignment to that judge, *or* to Joyce, J., who is linked with him, and must be regarded and accepted as an assignment to both those judges

jointly, or in the alternative. For working purposes, confusion has been avoided by attaching one set of chambers to each pair of judges, and, on the whole, the arrangement has worked well. But the assignment of an action or matter to a judge in the Chancery Division is no longer what it purports to be, and the cause lists kept for the separate judges have been somewhat complicated by this system of linked judges. See CAUSE LIST (CHANCERY DIVISION).

FORM.

Certificate for Assignment of a Particular Judge.

[*Title as in writ, or originating summons, etc.*]

I, A. B., solicitor for the above-named C. D. [plaintiff *or* applicant], hereby certify that the writ [summons *or* petition] annexed hereto relates to the administration of the same trust [*or*, the winding-up of the same company] as, or is so connected with the cause and matter entitled [*insert title*], and assigned to the Hon. Mr. Justice , as to be conveniently dealt with by the same judge.

(*Signed*)

[*Solicitor.*]

(*Countersigned*)

(*The Master in the Chambers of the Judge to whom the assignment is sought.*]

[Rules of the Supreme Court, 1883, Form Appx. A., Part I., No. 19.]

Assignment (Fraudulent).—See BANKRUPTCY; FRAUDULENT CONVEYANCES.

Assignment of Choses in Action.

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I. At Common Law.

The phrase "chose in action" includes not only debts, but stock in the funds, shares in a company—in short, "all personal chattels which are not in possession" (*per* Lord Blackburn in *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 440). At common law no such chose in action could be assigned or granted over to another. Any attempt to assign such a chose in action was invalid; the assignee could not sue on the assignment in his own name; the action could only be brought in the

name of the assignor. There were only two exceptions to this rule—(1) The Crown could assign its choses in action (4 T. R. 340). (2) There could be a valid assignment by operation of law, *e.g.* on marriage, death, or bankruptcy.

The law merchant, however, disregarded the rules of the common law, and permitted negotiable instruments to be freely assigned; the acceptor or indorser of a bill of exchange was always liable to be sued by a stranger with whom he had never contracted. And scrip issued in this country by the agent of a foreign government, entitling the holder, on payment of the instalments, to receive from that agent definite bonds of the foreign government, has been held to be negotiable by international custom, and to pass by delivery to a *bonâ fide* holder for value (*Goodwin* v. *Robarts*, 1876, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 1877, 2 Q. B. D. 194; *Bechuanaland Exploration Co.* v. *London Trading Bank, Ltd.*, [1898] 2 Q. B. 658; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144). So, too, Parliament has from time to time rendered certain choses in action assignable. Promissory notes, if not freely negotiable before, were rendered so by the Statutes 3 & 4 Anne, c. 9, and 7 Anne, c. 25. The sheriff was allowed to assign a bail-bond to a purchaser, who could then sue both the principal and the bail thereunder in his own name (4 & 5 Anne, c. 16, s. 20). Replevin bonds (11 Geo. II. c. 19); mortgage bonds of a company (8 & 9 Vict. c. 17, s. 45); bills of lading, if indorsed (18 & 19 Vict. c. 111); East India Bonds (51 Geo. III. c. 64, s. 4); mortgage debentures issued by land companies under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 78; debts and things in action of companies (Companies Act, 1862, 25 & 26 Vict. c. 89); choses in action of bankrupts (32 & 33 Vict. c. 71, s. 22); and transferable debentures under the County Debenture Act, 1873, 36 & 37 Vict. c. 35, were subsequently made assignable. By 30 & 31 Vict. c. 144, policies of life assurance may be legally assigned, either by indorsement of the policy, or by a separate instrument in the form provided by the Act. And by 31 & 32 Vict. c. 86, policies of marine insurance may similarly be assigned by indorsement in statutory form. In all these cases, the assignee could sue at law in his own name.

But in all other cases the common law remained unaltered till 1875. Thus an ordinary simple contract debt could not, before the Judicature Act, be legally assigned, nor could the benefit or burden of a covenant in a deed, apart from an interest in realty. And, what is more, the original parties to the contract could not make it assignable, if it was not assignable by the law merchant or under some statute; they could not of their own motion create a new class of negotiable instruments, or add to their obligation a quality which was not inherent in it by law (*Couch* v. *Credit Foncier of England*, 1873, L. R. 8 Q. B. 374; *Fine Art Society* v. *Union Bank*, 1886, 17 Q. B. D. 705; *Picker* v. *London and County Bank*, 1887, 18 Q. B. D. 515; *London and County Bank* v. *River Plate Bank*, 1887, 20 Q. B. D. 232). The only way in which a debt could be transferred at common law was by a new contract, in which all three parties—assignor, assignee, and debtor—took part. And this new contract required consideration to support it; the debtor had to be released by the assignor, and to consent expressly in consideration of such release to become liable to the assignee (*Tatlock* v. *Harris*, 1789, 3 T. R. 174, 180; *Fairlie* v. *Denton*, 1828, 8 Barn. & Cress. 395; *Kemp*

v. *Watt*, 1846, 15 Mee. & W. 672). This was in fact a *novation*, not an assignment.

The reasons given for this state of the law were that the Courts ought not to relax the rules relating to privity of contract; that to do so would lead to oppression and multiplicity of suits (see *Lampet's* case, 1613, 10 Rep. 48*a*); that it was the duty of a debtor to seek out his creditor and find him, if he were anywhere within the narrow seas; and that it would be difficult for him to do this, if the debt might without his consent be assigned to a stranger (6 C. B. 290*n*).

II. In Equity.

No regard was ever paid to these considerations in equity. The Court of Chancery from a very early period recognised as valid, and carried into effect, assignments of a chose in action, and even of a mere naked possibility, provided they were made for valuable consideration (*Anon.*, 1673, Free. Chy. 145; 22 E. R. 1118; *Squib* v. *Wyn*, 1717, 1 P. Wms. 378; 24 E. R. 432). Thus a mere expectancy, such as that of an heir-at-law to the estate of an ancestor (*Hobson* v. *Trevor*, 1723, 2 P. Wms. 191; 24 E. R. 695), or the interest which a person may take under the will of another then living (*Warmstrey* v. *Lady Tanfield*, 1629, 1 Ch. R. 29; 21 E. R. 498; 2 W. & T. L. Cas., 6th ed., 794; *Musprat* v. *Gordon*, 1792, 1 Anst. 34; 3 R. R. 541; *Bennett* v. *Cooper*, 1846, 9 Beav. 252; 50 E. R. 340), was always assignable in equity for valuable consideration; and when the expectancy fell into possession the assignment would be enforced, unless public policy or some other rule of equity forbade. The same rule prevailed, and still prevails, in equity in the case of non-existing property to be hereafter acquired, such as freight not yet earned (*Lindsay* v. *Gibbs*, 1856, 22 Beav. 522; 52 E. R. 1209), future patent rights (*Printing, etc., Co.* v. *Sampson*, 1875, L. R. 19 Eq. 462), or machinery yet to be erected (*Holroyd* v. *Marshall*, 1862, 10 H. L. C. 191; 11 E. R. 999; 33 L. J. Ch. 193). But the claim of such an assignee will always be postponed to the right of a *bonâ fide* purchaser, who secures the legal title (*Joseph* v. *Lyons*, 1884, 15 Q. B. D. 280; *Hallas* v. *Robinson*, 1885, 15 Q. B. D. 288); and is subject also to the title of the assignor's trustee in bankruptcy, in case the bankruptcy occurs before the expectancy falls into possession (*Ex parte Hall*, 1879, 10 Ch. D. 615; *Collyer* v. *Isaacs*, 1881, 19 Ch. D. 342; *Ex parte Nichols*, 1883, 22 Ch. D. 782; *Wilmot* v. *Alton*, [1896] 2 Q. B. 254; but see *Ex parte Rawlings*, 1888, 22 Q. B. D. 193). No man can make a valid assignment of money which never accrues due to him, but only to his trustee in bankruptcy. On the other hand, "a garnishee order binds only so much of the debt owing to the debtor from a third party, as the debtor can honestly deal with at the time the garnishee order was obtained" (*Davis* v. *Freethy*, 1890, 24 Q. B. D. 522). Hence the judgment creditor of an assignor, who has obtained a garnishee order without any notice of the assignment, can only attach such property of his debtor as the debtor could himself deal with properly, and without violation of the rights of the assignee (*Ex parte Whitehouse*, 1886, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 1888, 38 Ch. D. 238).

But equity could not wholly disregard the law in this matter. If the assignee were allowed to sue in equity and recover the debt behind

the back of the assignor, the unfortunate debtor might be subjected to a second action at common law, and be compelled to pay the debt over again. If the assignor had given a power of attorney authorising the assignee to sue for the debt in the name of the assignor, and that course was adopted, the judgment would bind the assignor (as it would stand in his name), and be a good discharge to the debtor at law as well as in equity. But if the assignee sued in his own name in equity, the decree in his favour would be no bar to an action by the assignor at common law. If the chose in action was of a purely equitable nature, this would not matter; as the assignor could never sue for it at law. But in all other cases the equity judges very properly required the assignee to bring the assignor before the Court, so that he should be bound by their decree. If he would not consent to join as a co-plaintiff with the assignee, he was made a defendant; but he had to be a party to the proceedings on one side or other of the record.

III. Under the Judicature Act.

There being this conflict between law and equity, a provision curiously limited was inserted in the Judicature Act of 1873, which did not wholly supersede the common law, nor establish the equitable procedure, but which created a *tertium quid*:

Sec. 25, subs. 6.—"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee, if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."

This section, it will be observed, affects procedure rather than the substantive law; "it does not give new rights, but only affords a new mode of enforcing old rights" (*Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 515; *Read* v. *Brown*, 1888, 22 Q. B. D. 128). It makes nothing an assignment which was not an assignment before (*Schroeder* v. *The Central Bank*, 1876, 24 W. R. 710; 34 L. T. 735). On the other hand, many an assignment which was valid in equity before the Judicature Act is not within the scope of this section, and is therefore still invalid in law, and can only be enforced in the manner usual in Courts of equity before the Act, *i.e.* the assignor must still be joined, either as a plaintiff or a defendant (see *Turquand* v. *Fearon*, 1879, 4 Q. B. D. 280). And in cases which do fall within the section, all former equities remain; the assignee has the benefit of a new procedure at law; but none of the rights of the debtor or of the assignor are restricted or destroyed (*Hudson* v. *Fernyhough*, 1889, 61 L. T. 722; and

see the judgment of A. L. Smith, J., in *Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 517).

The distinctions between assignments within the section and those outside it should be carefully noted, so that the plaintiff may know which procedure to adopt:—

(1) The section deals only with absolute assignments "not purporting to be by way of charge only." This distinction is explained, *post*, IV.

(2) To be within the statute, the assignment must be of some "debt or other legal chose in action." What is meant by the phrase "legal chose in action" is discussed, *post*, p. 564.

(3) It was essential to the validity of an equitable assignment before the Act (and it still remains essential in all cases not within this section), that the assignment should be for valuable consideration; without such consideration there was no ground for the interference of a Court of equity. But in the case of an assignment, otherwise valid under this section, it is not necessary that there should be any consideration for the assignment (*Lee* v. *Magrath*, 1882, 10 L. R. Ir. 45; *Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 511; *Harding* v. *Harding*, 1886, 17 Q. B. D. 442).

(4) To bring the case within the section, the assignment must be in writing and express notice thereof must be given in writing to the debtor or holder of the fund. The assignee must prove both, or he will establish no cause of action (*Read* v. *Brown*, 1888, 22 Q. B. D. 128). In equity (apart from the Statute of Frauds, as to which see *Ex parte Hall*, 1879, 10 Ch. D. 615), a verbal assignment, if clearly proved, was formerly, and still is, sufficient, provided the assignor be made a party to the action, and the assignment be for valuable consideration (*Field* v. *Megaw*, 1869, L. R. 4 C. P. 660). So also a verbal notice to the debtor is quite sufficient to make the assignment good in equity (*Ex parte Agra Bank*, 1868, L. R. 3 Ch. 555).

(5) But an assignment under the Judicature Act resembles an equitable assignment, and differs from the transfer of a negotiable instrument under the law merchant in this, that the assignee takes subject to all sets-off and equities which would avail against the assignor, not merely at the date of the assignment, but until notice is given (*Walker* v. *Bradford Old Bank*, *supra*).

As to the procedure under the concluding proviso of the section, which extends the power to interplead, see *In re New Hamburg Rly. Co.*, 1875, W. N. 239; *In re Sutton's Trusts*, 1879, 12 Ch. D. 175; *Reading* v. *School Board for London*, 1886, 16 Q. B. D. 686; and Order 57.

IV. What is an "Absolute" Assignment Within the Section.

Construction.—The assignment must be absolute; it must not purport to be "by way of charge only." "In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within sec. 25, and the action must be brought in the name of the assignee" (*per* Mathew, L.J.,

in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B., at p. 193). Though general words be used, yet, if when the whole instrument is looked at, it appears that what was intended was only to assign so much of the debt or chose in action as would provide security for a lesser debt due from the assignor to the assignee, it will be held that the instrument creates a charge only (*Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613; *Jones* v. *Humphreys*, [1902] 1 K. B. 10). "By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt" (*per* Day, J., in *Burlinson* v. *Hall*, 1884, 12 Q. B. D., at p. 350). But a document will be held an absolute assignment whenever it is clear from the terms of it that the intention of the parties was to transfer to the assignee complete control of the fund, and to put him for all purposes in the position of the assignor with regard to it (*Comfort* v. *Betts*, [1891] 1 Q. B. 737; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190).

It is submitted that the following are the tests which determine whether an assignment is or is not an "absolute assignment" within the section.

1. Has the assignor divested himself of all right to sue for the debt or other chose in action and transferred that right to the assignee? If the assignor can still sue the debtor or holder of the fund the assignment is not absolute. It would be manifestly unfair to leave the debtor exposed to attack from two quarters.

2. Does the assignment entitle the assignee to receive the money, and will his receipt be a good discharge for it?

3. Will the assignment when perfected by notice prevent the debtor or holder of the fund from paying anyone but the assignee; and can the debtor safely pay the assignee without inquiring into the state of the accounts between the assignor and the assignee?

4. Is the debtor or holder of the fund bound to pay the assignee the whole debt, or so much of it as has been definitely assigned? If he has a right, notwithstanding the assignment, to have accounts taken between himself and the assignor before making any payment to the assignee, the assignment is by way of charge only and not an absolute assignment within the section (see the judgment of Vaughan Williams, L.J., in *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B., at p. 617).

No special form of words is necessary; any words will suffice which show a clear intention to transfer a chose in action, or which distinctly appropriate a specific portion of a specified fund, to or to the use of the assignee (*Rodick* v. *Gandell*, 1852, 1 De G., M. & G. 763, 776; 42 E. R. 749; *Percival* v. *Dunn*, 1885, 29 Ch. D. 128; *Gorringe* v *Irwell Co.*, 1886, 34 Ch. D. 128). The language must be sufficiently imperative to make it the *duty* of the debtor or holder to pay the money, when the time for payment arrives, to the assignee and not to the assignor. Documents commencing, "I hereby authorise you to pay," etc., were held sufficient in *Lett* v. *Morris*, 1831, 4 Sim. 607; 58 E. R. 227; *Diplock* v. *Hammond*, 1854, 2 Sm. & G., 141; 5 De G., M. & G. 320; 65 E. R. 339; 42 E. R. 893; 33 R. R. 156; and *M'Gowan* v. *Smith*, 1856, 26 L. J. Ch. 8. But a mere suggestion to the debtor or holder, leaving him free to exercise his discretion in whatever way he thinks best, will not be sufficient (*Watson* v. *Duke of Wellington*, 1830, 1 Russ. & M. 602; 39 E. R. 231; 32 R. R. 293).

It is not enough to mention the existence of a particular fund; there

must be a clear intention to deal with it so as to benefit the assignee. Thus, merely informing a creditor that he will be paid as soon as a certain fund comes to hand, is no assignment of that fund (*Malcolm* v. *Scott*, 1843, 3 Hare, 39; *Jones* v. *Starkey*, 1852, 16 Jur. 510). A promise to pay money when the person promising shall be paid a debt due to him from a third person, is no assignment of that debt (*Field* v. *Megaw*, 1869, L. R. 4 C. P. 660). Drawing a bill of exchange on a merchant, or a cheque payable at a particular bank, is no assignment of any portion of the drawer's balance in the hands of that merchant or at that bank (*Shand* v. *Du Buisson*, 1874, L. R. 18 Eq. 283; *Hopkinson* v. *Forster*, 1874, L. R. 19 Eq. 74; *Schroeder* v. *The Central Bank*, 1876, 24 W. R. 710; 34 L. T. 735; *Brown, Shipley & Co.* v. *Kough*, 1885, 29 Ch. D. 848).

Again, the debt or fund assigned must be clearly indicated; so that there will be no difficulty hereafter in identifying the property, an interest in which is transferred (*Percival* v. *Dunn*, 1885, 29 Ch. D. 128). Especial care is necessary in the case of choses in action which are not yet vested in the assignor. These must be assigned as completely as any other debt; the document must purport by its own force to convey an interest in them to the assignee, leaving nothing to be done by either assignor or assignee to complete the title of the latter when they come into existence (*Reeve* v. *Whitmore*, 1864, 4 De G., J. & S. 1; 46 E. R. 814; 33 L. J. Ch. 63). If that be done, then very general words will suffice. Thus: "I hereby undertake that I will, when and as received, pay over to you all dividends coming to me in respect of my proof for £800 upon the estate of A." is a good assignment of all dividends subsequently declared (*In re Irving*, 1877, 7 Ch. D. 419). So, too, an assignment of "all the book-debts due and owing, or which may, during the continuance of this security, become due and owing to the mortgagor," is perfectly valid and sufficiently specific, though not limited to the book-debts of any particular business, and will entitle the assignee to recover all book-debts incurred after the assignment, whether in the business carried on by the mortgagor at the date of the assignment, or in any other business (*Tailby* v. *Official Receiver*, 1888, 13 App. Cas. 523, overruling *Belding* v. *Read*, 1865, 3 H. & C. 955; and *In re D'Epineuil*, 1882, 20 Ch. D. 758; but see *International Fibre Syndicate* v. *Dawson*, 1901, 84 L. T. 803).

How made.—To bring the case within the section the assignment must be "in writing under the hand of the assignor," and express notice of it in writing must be "given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action." That the writing is under seal is immaterial (*Marchant* v. *Morton, Down & Co.*, [1901] 2 K. B. 829). The usual course is for the assignment to be addressed by the assignor to the assignee, and to be retained by the assignee, who addresses a separate document to the holder of the fund, giving him notice of the assignment. But this is not necessary. If the assignor thinks fit to part with the document constituting his title, and to forward it to the debtor, so as to make the one document both assignment and notice of assignment, this will be equally efficacious. Or, again, the assignor may address the document which constitutes the assignment to the holder of the fund and forward it to him, directing him to pay the money in accordance therewith; and this will be sufficient, both in equity and

under sec. 25 of the Judicature Act, 1873, subs. (6), if the document be shown or otherwise made known to the assignee (*per* Lord Eldon, in *Ex parte South*, 1818, 3 Swans. 392; 19 R. R. 227; *Lett* v. *Morris*, 1831, 4 Sim. 607; *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *Buck* v. *Robson*, 1878, 3 Q. B. D. 686; *Harding* v. *Harding and Another*, 1886, 17 Q. B. D. 442). But in such a case care must be taken not to word the document so as to make it an informal bill of exchange, which, if not properly stamped, would be wholly inadmissible in evidence (*Diplock* v. *Hammond*, 1854, 2 Sm. & G. 141; 5 De G., M. & G. 320; 65 E. R. 339; 42 E. R. 893; 33 R. R. 156; 23 L. J. Ch. 550; *Ex parte Shellard*, 1873, L. R. 17 Eq. 109).

Order to Pay.—If the document relied on as an assignment be addressed by the assignor, neither to the assignee nor to the debtor or the holder of the fund, but only to some agent of his own, such as his solicitor, rent-collector, bailiff or steward, then this is not an assignment, so long, at all events, as it remains unknown to the assignee. Till then, it is like a power of attorney, or the appointment of a receiver (*Rodick* v. *Gandell*, 1851, 1 De G., M. & G. 763; 42 E. R. 749; *Bell* v. *L. & N.-W. Railway Co.*, 1852, 15 Beav. 548; 51 E. R. 651). It is a mere mandate from a principal to his own agent, bidding him pay a debt out of a certain fund; and this gives the creditor no specific charge on that fund (*Morell* v. *Wooten*, 1852, 16 Beav. 197; 51 E. R. 753). Until it is communicated to the creditor, and assented to by him, it may be revoked (*Scott* v. *Porcher*, 1817, 3 Mer. 652; 36 E. R. 250; 17 R. R. 161), but not afterwards (*Greenway* v. *Atkinson*, 1881, 29 W. R. 560). And the bankruptcy or death of the principal operates as such a revocation (*Ex parte Hall*, 1879, 10 Ch. D. 615; *In re Russell*, 1893, 37 Sol. J. 212). But after such communication, the money is "fixed" in the agent's hands, and the order cannot be countermanded (*Fitzgerald* v. *Stewart*, 1831, 2 Russ. & M. 457; *Palmer* v. *Culverwell*, 1902, 85 L. T. 758).

Power of Attorney.—An absolute assignment should *not* contain any words empowering the assignee to sue in the name of the assignor. This is still sometimes done; it is a survival from former days. But the presence of such a clause at once suggests that the assignor has not transferred to the assignee the right to sue himself. Unless the assignor has divested himself of the right to sue, the case does not fall within the section. The fact that the assignment empowers the assignee to bring an action in the name of the assignor is *evidence* to show that the assignor has not divested himself of all right to sue (*Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613); although if the assignment be in other respects absolute, the inclusion in it of a power of attorney or of a covenant for further assurance will not be *conclusive* to take the case out of the section (*Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B., at p. 198).

Mortgage.—It is now clear law that a mortgage may be an absolute assignment within the section. This at first was doubted; the contrary was held in *National Provincial Bank of England* v. *Harle*, 1881, 6 Q. B. D. 626, but this case is no longer law. It was decided in *Tancred* v. *Delagoa Bay Rly. Co.*, 1889, 23 Q. B. D. 239, that a mortgage of debts due to the mortgagor, made in the ordinary form, with a proviso for redemption and reconveyance upon repayment, provided it transfers the property to the mortgagee subject to that proviso, is an absolute assignment. "A mortgagee is not mentioned in the enactment; but where there is an absolute assignment of the debt, the limiting words as to a charge

only are not sufficient to exclude a mortgage" (*per* Chitty, L.J., in *Durham* v. *Robertson*, [1898] 1 Q. B., at p. 772, cited with approval by Mathew, L.J., in *Hughes* v. *Pump House Hotel Co.*). "It has been repeatedly held that the word 'absolute' does not mean absolute by way of sale, and that the assignment may be 'absolute' though by way of mortgage (see *Burlinson* v. *Hall*, 1884, 12 Q. B. D. 347, and *Tancred* v. *Delagoa Bay and East Africa Rly. Co.*, 1889, 23 Q. B. D. 239). These were decisions of Divisional Courts, but the Court of Appeal has adopted the same view. . . . If, on the construction of the document, it appears to be an absolute assignment, though subject to an equity of redemption, express or implied, it cannot, in my opinion, be material to consider what was the consideration for the assignment, or whether the security was for a fixed and definite sum, or for a current account. In either case the debtor can safely pay the assignee, and he is not concerned to inquire into the state of the accounts between the assignor and the assignee" (*per* Cozens-Hardy, L.J., in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B., pp. 196-8).

Declaration of Trust.—A deed by which debts are assigned to the plaintiff upon trust, that he should receive them, and out of them pay himself a sum due to him from the assignor, and then pay the surplus to the assignor, is an absolute assignment within the section (*Burlinson* v. *Hall*, 1884, 12 Q. B. D. 347; *Ibberson* v. *Neck*, 1886, 2 T. L. R. 427). An assignment of a debt or legal chose in action may be absolute within the Judicature Act, 1873, s. 25, subs. 6, although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignor (*Comfort* v. *Betts*, [1891] 1 Q. B. 737; *In re Bell*, [1896] 1 Ch. 1; and see *Palmer* v. *Culverwell*, 1902, 85 L. T. 758). It is not necessary that there should be any consideration for an absolute assignment under the Act; it is not necessary that the assignee should take any beneficial interest for himself; the motive for which the assignment is made is immaterial.

Thus, where a foreigner resident abroad assigned to the plaintiff a debt, due to him from the defendant, by a deed which purported, in consideration of £50 paid by the plaintiff, to absolutely assign the debt, whereas, in fact, the assignment was made to the plaintiff in order to enable him to sue in England in his own name to recover the debt for the benefit of the assignor, and the plaintiff had not paid any sum by way of consideration to the assignor, it was held that there was an absolute assignment in writing within sec. 25, subs. 6, of the Judicature Act, 1873, which entitled the plaintiff to sue in his own name (*Wiesener* v. *Rackow*, 1897, 76 L. T. 448). So where the plaintiff took from creditors of the defendant an absolute assignment of their debts in consideration of a covenant by him that, if he should recover the amount of the debts from the defendant, he would pay over to them the amounts of their respective debts, or so much thereof as he might be able to realise after payment of the costs necessarily incurred by him; and it appeared that the plaintiff and the defendant were co-directors of a company, and the plaintiff, being dissatisfied with the action of the defendant as director of the company, took the assignment with a view to procuring an adjudication of bankruptcy against the defendant, and so getting him removed from the directorate of the company; this was held by the Court of Appeal to be a good assignment (*Fitzroy* v. *Cave*, [1905] 2 K. B. 364).

What may be Assigned.—The section applies only to an assignment of

"any debt or other legal chose in action." The word "legal" was probably inserted, because equitable choses in action were already assignable; but it would have been better omitted; as now since the fusion of law and equity it is somewhat difficult to define "a legal chose in action." The phrase clearly is not restricted to those choses in action which could be assigned at law before the Act was passed. It must surely include all choses in action which the assignor, in the absence of any assignment, could now recover by an action in the King's Bench Division.

No one can sue on a contract unless he be either an original party to it, or the lawful assignee of an original party. The benefit of most contracts can now be assigned to a stranger without the consent of the party burdened by it (*Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608). The burden of a contract, as a rule, cannot be assigned without the consent of the party entitled to the benefit of it, unless some benefit be assigned along with the burden (*Tolhurst* v. *Assoc. Portland Cement Manufacturers, Ltd.*, [1903] A. C. 414). In particular, the duty of performing a contract cannot be assigned, without the consent of the other party, wherever its performance involves personal skill, knowledge, or supervision which is not capable of being rendered by everyone, *e.g.* a contract to publish a book (*Griffith* v. *Tower Publishing Co.*, [1897] 1 Ch. 21; *Dr. Jaeger's Sanitary Woollen Co.* v *Walker*, 1897, 77 L. T. 180; *International Fibre Syndicate* v. *Dawson*, 1901, 84 L. T. 803).

A debt not yet due is a legal chose in action (*Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *West* v. *Newing*, 1900, 82 L. T. 260). But legacies, trust funds, and claims against the estate of a deceased person which is being administered in the Chancery Division, remain apparently *equitable* choses in action. Are these within the section? In *Cronk* v. *M'Manus*, 1892, 8 T. L. R. 449, Denman, J., held that "a mere equity of redemption" was not "a legal chose in action." A promise by a lender to make further advances to the borrower is not a legal chose in action (*Western Wagon Company* v. *West*, [1892] 1 Ch. 271; *May and Another* v. *Lane*, 1894, 64 L. J. Q. B. 237). The Court of Appeal in the latter case expressed the opinion (*obiter*) that the right to bring an action for unliquidated damages, whether in tort or contract, was not "a legal chose in action" within this section, and therefore not assignable, *sed quære*. In *King* v. *Victoria Insurance Company, Ld.*, [1896] A. C. 250, the Supreme Court of Queensland held that identical words in their Colonial Act included "all rights, the assignment of which a Court of law or equity would before the Act have considered lawful" (p. 254), and the Judicial Committee of the Privy Council did "not express any dissent" from this view (p. 256). In *Dawson* v. *Great Northern and City Railway*, [1904] 1 K. B., at p. 281, Wright, J., after referring to *May* v. *Lane*, said: "There are no doubt some expressions in the judgments of the Lord Justices in the case of the *Colonial Bank* v. *Whinney*, 1885, 30 Ch. 261, which seem to approve a statement in Williams on *Personal Property*, to the effect that a right to damages for a tort may be a legal chose in action; but the decision of the Court of Appeal in that case was reversed in the House of Lords, 1886, 11 App. Cas. 426, and it is difficult to suppose that it was intended by sec. 25 of the Judicature Act to make all rights as to damages—for example, for libel or assault—assignable under that section." But all that his Lordship *decided* in *Dawson* v. *Great Northern and City Railway* was that a claim for compensation under sec. 68 of the Lands Clauses Act, 1845, for

injuriously affecting land was not a legal chose in action, because it was "a claim for damages for a wrong which cannot be stopped by injunction or otherwise remedied in an action" (p. 281; the head note is too wide). See CHOSES IN ACTION.

A debt not yet due or payable is clearly assignable, if apt words be used, not merely in equity, but also at law under the Judicature Act, *e.g.* rent not yet due (*Southwell* v. *Scotter*, 1880, 49 L. J. Q. B. 356; *Knill* v. *Prowse*, 1884, 33 W. R. 163), or retention-money not yet payable under a building contract (*Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *Buck* v. *Robson*, 1878, 3 Q. B. D. 686; *Ex parte Moss*, 1884, 14 Q. B. D. 310: *Drew & Co.* v. *Josolyne*, 1887, 18 Q. B. D. 590). So, too, an assignment of "all moneys of or to which he now is, or may during this security become, entitled under any settlement, will, or other document, either in his own right or as next-of-kin of his father, or any other person or persons," is not too vague, and will operate to pass to the assignee a share in residuary personalty, to which the assignor subsequently became entitled under the will of a testator, not his father (*In re Clarke*, 1887, 36 Ch. D. 348). "Vagueness comes to nothing if the property is definite at the time when the Court is asked to enforce the contract" (*per* Cotton, L.J., *ibid.*, p. 353). Thus where a person purported to assign a portion of a fund larger than that to which he was entitled, but afterwards became entitled to the whole of the portion which he had assigned, the Court held that the good title which he had so subsequently acquired was available to make the assignment effectual (*In re Hoffe's Estate Act*, 1900, 82 L. T. 556). On the other hand, if the words be precise, but there is clear and satisfactory evidence that neither party intended the document to be an assignment, the Court will go behind the literal meaning of the words, and construe them according to the true intention of the parties (*In re Sheward*, [1893] 3 Ch. 502).

The presence in a contract of an express condition, that it "shall not be assignable in any case whatever," will not prevent an assignment of the beneficial interest thereunder (*In re Turcan*, 1888, 40 Ch. D. 5; *In re Griffin*, 1898, 79 L. T. 442). The question what effect must be given to an express promise by an assignor, that he will not create any prior charge on the property assigned, is discussed in *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434; *English and Scottish Co., Ld.*, v. *Brunton*, [1892] 2 Q. B. 700; and *Robson* v. *Smith*, [1895] 2 Ch. 118. A provision in a policy preventing assignment, except on conditions, is good, and prevents the policy being assigned, except in conformity with those conditions (*Laurie and West Hartlepool T.I.A.* v. *David*, [1899] 4 C. C. 322; and see *Stokell* v. *Heywood*, [1897] 1 Ch. 459).

An assignment of a chose in action by a person to himself jointly with another person, or by a husband to his wife, or by a wife to her husband, alone or jointly with another person, is now, since December 31, 1881, perfectly valid (44 & 45 Vict. c. 41, s. 50). One partner can make a valid assignment of a debt due to the firm (*Marchant* v. *Morton, Down & Co.*, [1901] 2 K. B. 829).

Assignment of Part of a Debt.—The assignment of an undefined portion of a future debt is not a good assignment within sec. 25, subs. 6, of the Judicature Act, 1873, and it is now very doubtful whether a definite portion of a future unascertained, but ascertainable, debt can be assigned under the statute. The Courts have more than once avoided deciding this question. So long as the decision of Lord Coleridge, C.J.,

in *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569, remained unquestioned, it appeared to be clear that a portion of any debt could be assigned, and this decision was followed in *Ex parte Moss*, 1884, 14 Q. B. D. 310, and *Drew & Co.* v. *Josolyne*, 1887, 18 Q. B. D. 590. But doubt has recently been cast on the correctness of these decisions. In *Durham Brothers* v. *Robertson*, [1898] 1 Q. B., at p. 744, Chitty, L.J., says: "The decision of Lord Coleridge, C.J., in *Brice* v. *Bannister*, that the case fell within the 25th section, appears to me to be open to question. . . . The section speaks of an absolute assignment of any debt or other chose in action. It does not say 'or any part of a debt or chose in action.' It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment." Collins, L.J., merely says: "I pronounce no opinion on the question whether an assignment of a part of a debt is within sec. 25, subs. 6, of the Judicature Act, 1873" (p. 775). In *Jones* v. *Humphreys*, [1902] 1 K. B. 10, the decision in *Brice* v. *Bannister* was again questioned. The learned judges differed somewhat in the reasons which they gave for their decision. Lord Alverstone, C.J., said: "I think there is no doubt that an absolute assignment of future debts may be a good assignment for the purposes of the section; and I also think that an absolute assignment of a definite sum out of a future debt may possibly be within the section. But I think that an assignment of an undefined portion of future debts will not come within it" (p. 13). Darling, J., said: "Even if the sum had been ascertained, I think, having regard to the expression of opinion by Chitty, L.J., in *Durham Brothers* v. *Robertson*, it is extremely doubtful whether the assignment, being of part of a debt only, would come within the Act" (p. 14). Channell, J., said: "I do not think it necessary to decide the point which was left open in *Durham Brothers* v. *Robertson*, as to whether the assignment of part of a debt can come within the section" (p. 14).

In *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, the question was again raised, and again not decided. Lord Justice Mathew said (at p. 195): "The question was raised whether an assignment of part of a debt comes within sec. 25 of the Judicature Act, 1873. We are not called upon to decide that question in this case, and I will express no opinion upon it, further than to say that, as at present advised, I think, when that question arises for decision, much may be said in favour of the view that an assignment of part of a debt could not be an absolute assignment within the section." Lord Justice Cozens-Hardy expressed no opinion on the point. In *Torkington* v. *Magee*, [1902] 2 K. B., at p. 434, Channell, J., said: "The document was in the form: 'We authorise you to pay £50 out of the moneys due or to become due to us on the buildings we are erecting.' If there had been any debt, this might have been a good assignment of £50 out of it, although *Brice* v. *Bannister*, which so holds, has been somewhat doubted in *Durham Brothers* v. *Robertson*, and *Jones* v. *Humphreys*." (The decision of Channell, J., in this case was reversed in the Court of Appeal on the facts, no opinion being expressed as to the point of law.)

On the other hand, in *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208, A. had two creditors (B. and C.); he wrote a letter to his agent directing him to sell some goods, and out of the proceeds to pay B. £400, and the balance to C.; he also wrote to C. advising him what he had done. Bigham, J., held at Nisi Prius that these two letters constituted a valid

assignment of the balance of the proceeds to C. as soon as they were posted. But none of the cases mentioned above were cited to his Lordship.

Effect of the Assignment.—If the assignment be given under seal or for valuable consideration, it is binding at once on the assignor, and cannot be revoked by him (*Fortescue* v. *Barnett*, 1834, 3 Myl. & K. 36); it binds also the assignor's trustee in bankruptcy and any execution creditor of his (*Gorringe* v. *Irwell*, 1886, 34 Ch. D. 128). The assignment is completed as soon as the writing is *posted*, although the assignor become bankrupt before it is received (*Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208). Then, as soon as notice of the assignment is given to the debtor or the holder of the fund, it binds him too; it "fixes the money in his hand"; he can no longer pay the debt to the assignor, or hand over the fund to him, without first satisfying the assignee. If there was no consideration for the assignment, and it was not under seal, it can still be revoked; but, till it is revoked, it is valid and binding on the debtor or holder of the fund; any payment made by him in compliance with it is a good payment as against the assignor; and the receipt of the assignee is a discharge for the full amount assigned. And it will be idle for the assignor subsequently to repudiate the assignment, or to attempt after payment to countermand his order. There is no need of any express acceptance of the order by the holder of the fund; he need not attorn to the assignee or enter into any contract to hold the fund for him (*Yeates* v. *Groves*, 1791, 1 Ves. Jun. 281; 30 E. R. 343; *Burn* v. *Carvalho*, 1839, 4 Myl. & Cr. 703; 41 E. R. 265; 48 R. R. 213; *Bell* v. *L. & N.-W. Railway Co.*, 1852, 15 Beav. 548; 51 E. R. 651). For it is unnecessary for a man to promise expressly to do what he is bound to do (*William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454); and the holder must pay the money over to the assignee, even though the assignee refuses to indemnify him. If he pays the assignor, he can be compelled to pay the assignee over again (*Jones* v. *Farrell*, 1857, 1 De G. & J. 208; 44 E. R. 703).

Invalid Assignments.—An assignment of all a man's property, present and future, may be invalidated as an act of bankruptcy. But an assignment which affects one species of property only is valid (13 App. Cas. 535). An assignment after bankruptcy petition, but before appointment of a receiver, is protected by sec. 49 of the Bankruptcy Act, 1883 (*In re Dunkley & Son*, [1905] 2 K. B. 683). Again, public policy forbids that effect should be given to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of their official duties. Thus the pay of an officer in the army (*Stone* v. *Lidderdale*, 1795, 2 Anst. 533; 3 R. R. 622), and the salary of a judge, given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased (*Arbuthnot* v. *Norton*, 1846, 5 Moo. P. C. 219; 13 E. R. 474; *Grenfell* v. *The Dean and Canons of Windsor*, 1840, 2 Beav. 544, 550; 48 E. R. 1292; 50 R. R. 279).

On similar principles of public policy, the Court will not give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles (*Stevens* v. *Bagwell*, 1808, 15 Ves. 139; 33 E. R. 707; 10 R. R. 46; *Reynell* v. *Sprye*, 1852, 1 De G., M. & G. 660; 42 E. R. 710; *Earle* v. *Hopwood*, 1861, 9 C. B. N. S. 566;

Fitzroy v. *Cave*, [1905] 2 K. B. 364). A sale and assignment by a client to his solicitor *pendente lite*, of the subject-matter of the action, is invalid (*Simpson* v. *Lamb*, 1857, 7 El. & Bl. 84; *Anderson* v. *Radcliffe*, 1860, 6 Jur. N. S. 578), provided the relationship of solicitor and client exists at the date of the assignment (*Davis* v. *Freethy*, 1890, 24 Q. B. D. 519; *Rees* v. *De Bernardby*, [1896] 2 Ch. 437). A mortgage of such subject-matter *pendente lite* is not necessarily invalid; but it may be tainted with champerty (*James* v. *Kerr*, 1888, 40 Ch. D. 449). Since choses in action are now attachable (under secs. 60 *et seq.* of the C. L. P. Act, 1854) an assignment of them may be void under 13 Eliz. c. 5, as tending to defeat, hinder, or delay creditors. If the effect, not necessarily the object, of the assignment is to defeat, hinder, or delay one particular creditor only, the assignment will be void under the statute (*Edmunds* v. *Edmunds*, [1904] P. 362).

Lastly, an assignment may in some cases be invalid, as an unregistered bill of sale (*Church* v. *Sage*, 1892, 41 W. R. 175; 67 L. T. 800; *London and Yorkshire Bank* v. *White*, 1895, 11 T. L. R. 570).

V. Notice.

How Effected.—The statute requires that notice in writing be given to the "debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action." The section does not state by whom the notice is to be given. It may be given by either the assignor or assignee, or by the executors of the assignee after his death, who will then be entitled to sue for the debt in their own names (*Bateman* v. *Hunt*, [1904] 2 K. B. 530). The method usually adopted is for the assignee to retain the assignment, and address a separate document to the debtor or holder of the fund, giving him notice of the assignment. Sometimes, however, the assignor forwards to the debtor the assignment itself, thus making the one document both assignment and notice; this will be sufficient, if done with the knowledge and consent of the assignee (*Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *Buck* v. *Robson*, 1878, 3 Q. B. D. 686; *Harding* v. *Harding and Another*, 1886, 17 Q. B. D. 442; *Palmer* v. *Culverwell*, 1902, 85 L. T. 758; and see *ante*, pp. 566-2). The statute does not fix any limit of time within which notice must be given. Hence a notice in writing, given by the assignee after the death of the assignor, will be sufficient (*Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 517).

No special form of words is necessary; any writing which gives the debtor notice of the assignment is sufficient. "The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril" (*per* Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Company*, [1905] A. C., at p. 462). But the notice must state the date of the assignment correctly, otherwise it will be invalid (*Stanley* v. *English Fibres Industries*, 1899, 68 L. J. Q. B. 839).

Necessity for Notice.—An assignment otherwise complete is binding as between assignor and assignee, although no notice has been given to the debtor or holder of the fund. And all persons claiming through or under the assignor will be equally bound by such an assignment, such

as a judgment creditor of the assignor (*Beavan* v. *Lord Oxford*, 1855, 6 De G., M. & G. 507), or a creditor who has obtained a garnishee order even without notice of the assignment (*Pickering* v. *Ilfracombe Railway Co.*, 1868, L. R. 3 C. P. 235; *Scott* v. *Lord Hastings*, 1858, 4 K. & J. 633; *Badeley* v. *Consolidated Bank*, 1888, 38 Ch. D. 238). Still there are many reasons why an assignee should never omit or delay to give notice of the assignment to the debtor or holder of the fund:—

1. He cannot sue the debtor or holder till such notice has been given; if he desires to sue in his own name, without making the assignor either a co-plaintiff or a co-defendant, he must give notice in writing.

2. If such notice be not given, the debtor or holder may pay the money to the assignor; and such payment *before notice* would be an answer to any proceeding by the assignee (*Williams* v. *Sorrell*, 1799, 4 Ves. 389; 31 E. R. 198; 53 R. R. 11); though the assignor can be compelled to pay over to the assignee the money which he has so received (*In re Patrick*, [1891] 1 Ch. 82). But as soon as notice of the assignment is given to the debtor or holder of the fund he can no longer make any payment to the assignor (*Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. 321).

3. The assignee takes subject to all equities which bind the assignor at the date of the notice: hence "the effect of not giving it, is to let in all equities which may exist or be created prior thereto" (*Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 517).

4. Debts due or growing due to a bankrupt in the course of his business are "goods and chattels" within the reputed ownership clause of the Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 44 (iii.). Notice of assignment is therefore necessary to take such a debt out of the apparent possession of the bankrupt; and such notice must be given prior to the date of the petition. No other choses in action, however, are now within the clause (see *Colonial Bank* v. *Whinney*, 1886, 11 App. Cas. 426), and the bankruptcy rules as to reputed ownership are not imported into the winding-up of companies (*Gorringe* v. *Irwell*, 1886, 34 Ch. D. 128).

5. The assignee of a chose in action is expected in equity to do all he can to complete his title, if only for the protection of innocent third persons. If he neglects to take any step obviously in his power (such as giving notice), and thereby enables the assignor to make a subsequent assignment of the chose in action to a purchaser for value, who takes without notice, his claim will be postponed to that of the subsequent assignee. Thus, if there be more than one assignment of the same chose in action, the assignee who first gives notice to the holder of the fund will obtain priority (*Dearle* v. *Hall*, 1827, 3 Russ. 1, 48; 38 E. R. 475; 27 R. R. 1; *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *Johnstone* v. *Cox*, 1880, 16 Ch. D. 571; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117; from the last case it appears that notice of an assignment is not required by the law of the State of New York). There is one exception: equitable charges on shares in registered companies have priority in order of date, irrespective of notice (*Société Générale de Paris* v. *Walker*, 1885, 11 App. Cas. 20).

For these reasons it is always prudent for the assignee, so far as the nature of the property admits, to put his mark on it, to show that it belongs to him and no longer to his assignor. Thus, if a trust fund be assigned, notice should be given to the trustee; if a debt, to the debtor; if a policy of assurance, to the office. Where stock held in trust is

assigned, a *distringas* should be obtained. Where the chose in action is a fund in Court, the assignee should obtain a stop-order, otherwise he will be postponed to a subsequent assignee who obtains one (*Mutual Life Co.* v. *Langley*, 1886, 32 Ch. D. 460; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26). But if notice was given to the trustee while he held the fund, there is no necessity for the assignee to obtain a stop-order on the fund being subsequently paid into Court; his title was completed on his giving the notice to the trustee (*Livesey* v. *Harding*, 1856, 23 Beav. 141; 53 E. R. 55; *In re Holmes*, 1885, 29 Ch. D. 786). Where notice of an assignment of an equitable interest has been given at or soon after the date of the assignment to all the then existing trustees, the assignee is under no obligation to give any further notice, and is consequently entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees and given notice of such assignment to the new trustees (*In re Wastdale*, [1899] 1 Ch. 163).

There is apparently only one case in which a debtor need pay no attention to a notice of assignment, and that is where he has already given to his creditor a negotiable instrument in payment of the debt. In that case notice of assignment may be disregarded even though the creditor, who has assigned the debt, is still the holder of the negotiable instrument (*Bence* v. *Shearman*, [1898] 2 Ch. 582).

VI. Equities affecting an Assignment.

The assignee of a chose in action, not transferable at common law, always took in equity, subject to any defences which the debtor or holder would have had against the assignor (*Ord* v. *White*, 1840, 3 Beav. 357; 49 E. R. 140); and by the express words of the statute a similar liability attaches in the case of an assignment under the Judicature Act. Thus, if a bond be void as against the assignor, it is void when in the hands of an assignee (*Turton* v. *Benson*, 1718, 1 P. Wms. 496; 24 E. R. 488). So a contract of sale which was obtained by misrepresentation, and which was therefore voidable as between the purchaser and the assignor, will be equally voidable as between the purchaser and the assignee; and the purchaser can recover from the assignee any moneys which he paid to the assignee before he elected to avoid the contract (*Fleming* v. *Lee*, [1901] 2 Ch. 594). If a release for the debt be given by the assignor to the debtor after assignment, but before any notice of assignment has been given, the assignee cannot recover (*Stocks* v. *Dobson*, 1853, 4 De G., M. & G. 11; 43 E. R. 411; 22 L. J. Ch. 884). The assignee of a legacy or of a share in a residuary personalty, although for value and without notice, takes subject to the testator's debts (*Hooper* v. *Smart*, 1875, 1 Ch. D. 90). So, if the debt be payable only on a certain condition, the condition binds the assignee (*Tooth* v. *Hallett*, 1869, L. R. 4 Ch. 242; *Drew & Co.* v. *Josolyne*, 1887, 18 Q. B. D. 590). The debtor or holder of the fund, if sued by the assignee, may set-off or counter-claim against him any matter which he could have set-off or counter-claimed against the assignor (*Rolt* v. *White*, 1862, 31 Beav. 520; 3 De G., J. & S. 360; 54 E. R. 1240; 46 E. R. 674; *Young* v. *Kitchin*, 1878, 3 Ex. D. 127). And generally the assignee takes subject to the state of accounts between the assignor and the debtor (*Bergmann* v. *Macmillan*, 1881, 17 Ch. D. 423),

This rule, that "the assignee of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor," is subject to this limitation, "that after notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice" (*per* James, L.J., in *Roxburghe* v. *Cox*, 1881, 17 Ch. D. 526; and see *Legh* v. *Legh*, 1799, 1 Bos. & Pul. 447; *In re Milan Tramways Co.*, 1882, 22 Ch. D. 122; 1884, 25 Ch. D. 587; *Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 157). "It would be quite unreasonable that the assignee, who has given notice of the assignment, should be held affected by transactions taking place behind his back with the assignor" (*per* Lord Herschell in *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C., at p. 331). But this will not prevent the defendant from availing himself of any set-off which arises, without any fresh act on his part, even after notice of assignment given, out of the same contract or transaction as gave rise to the debt assigned. He is entitled to have all accounts under that one contract taken together once for all, whether there has been an assignment or not (*Bergmann* v. *Macmillan*, 1881, 17 Ch. D. 423); and if he can show that, when such accounts are properly taken, there will be no balance in favour of the assignor, it would be inequitable to compel him to make any payment to the assignee. The law on this point may be thus stated:—

1. Any set-off which the debtor or holder of the fund had against the assignor at the moment he received notice of the assignment is good against the assignee, whether it arises out of the same contract or any other (*Biggerstaff* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93).

2. The defendant may also avail himself of any set-off or counter-claim which accrues to him after notice, if it arises out of the same contract or transaction as that on which he is sued (*Government of Newfoundland* v. *Newfoundland Railway Co.*, 1888, 13 App. Cas. 199).

3. But the defendant cannot raise against the assignee any set-off or counter-claim which arises after notice out of an independent contract, whether made before or after notice of assignment (see *Watson* v. *Mid-Wales Railway Co.*, 1867, L. R. 2 C. P. 593; *In re Milan Tramways Co.*, 1884, 25 Ch. D. 587; *Webb* v. *Smith*, 1885, 30 Ch. D. 192; *In re Asphalte Wood Pavement Co.*, 1885, 30 Ch. D. 216). Special rules apply in the case of an assignment by a defaulting trustee; they will be found in the judgment of Stirling, J., in *Doering* v. *Doering*, 1889, 42 Ch. D. 203. And see *In re Moss Bay Hematite Co.*, 1892, 8 T. L. R. 475; *Nelson* v. *Roberts*, 1893, 69 L. T. 352; and *Christie* v. *Taunton*, [1893] 2 Ch. 175.

In all these cases, it must be remembered the defendant can only use such set-off or cross-claim for his own protection; he cannot recover any money from the assignee. If the amount of the set-off or cross-claim exceeds the amount of the debt assigned, the assignee can recover nothing. But the defendant must sue the assignor for the balance (*Young* v. *Kitchin*, 1878, 3 Ex. D. 127; approved in *Government of Newfoundland* v. *Newfoundland Railway Co.*, *supra*; and see *Roxburghe* v. *Cox*, 1881, 17 Ch. D., at p. 526).

VII. Equitable Assignments since the Judicature Act.

A document which is not an absolute assignment within sec. 25, subs. 6, of the Judicature Act, may yet be a valid equitable assignment

under the old rules that existed in Chancery before 1875; for the former equity is not destroyed by the modern statute; they remain side by side distinct and separate things. "It is plain that every equitable assignment, in the wide sense of the term as used in equity, is not within the enactment" (*per* Chitty, L.J., in *Durham Brothers* v. *Robertson*, [1898] 1 Q. B., at p. 771, cited with approval by Cozens-Hardy, L.J., in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B., at p. 196). "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree" (*per* Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Company*, [1905] A. C., at p. 461). The distinction between the two modes of procedure has been already pointed out (*ante*, p. 559). If the assignment is not in writing, or if no notice of it has been given in writing, the assignee may still sue on it as an equitable assignment. But he must show a consideration, and strictly he must join the assignor either as a co-plaintiff or as a defendant (*William Brandt's Sons & Co.* v. *Dunlop Rubber Company, supra*, at p. 462).

See Warren on *Choses in Action*, and EQUITABLE ASSIGNMENT.

FORMS.

I. *Form of an Absolute Assignment under the Judicature Act*, 1873, *s.* 25, *subs.* 6.

March 7th, 1901.

To LLOYD'S BANK, LIMITED.

[Llandrindod Wells Branch.]

In consideration of your continuing a banking account with me, the undersigned, and by way of continuing security to you for all moneys due or to become due to you from me alone, or jointly with others, either on the said account or otherwise, I hereby assign to you all moneys due, or to become due, to me from the Pump House Hotel Company, Limited, of Llandrindod Wells, under or by virtue of a certain contract dated November 1st, 1899, and made between the said company of the one part and myself of the other part (being a contract for completion of the new pump-room and for making certain alterations and additions to the Pump House Hotel, Llandrindod Wells), and all other moneys, if any, due, or to become due, to me from the said company, including all moneys due, or to become due, for extras in connection with the works contemplated by the said contract; and I hereby empower you, on my behalf, and in my name, to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned, which shall discharge the person paying the same from being concerned to see to the application thereof; also, if necessary, to sue for, or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned, or any part thereof, and to compromise and settle any such proceedings on such terms as you may think fit, it being understood that all costs and expenses of recovering the moneys hereby assigned are to be paid out of the amount recovered; and I hereby undertake at your request and my cost to do and execute all such

further acts, deeds, and things as you may reasonably require for giving full effect to the security hereby created.

(*Signed*) WILLIAM HUGHES.

[See *Hughes* v. *Pump House Hotel Co., Ltd.*, [1902] 2 K. B. 190.]

II. *Form of Assignment of a Chose in Action given by a Shipbuilder.*

Dated Bridgwater,
October 27*th*, 1876.

To HENRY BANNISTER, ESQ.,
Barrow-in-Furness.

I do hereby order, authorise, and request you to pay to Mr. William Brice, solicitor, Bridgwater, the sum of £100 out of moneys due, or to become due, from you to me, and his receipt for same shall be a good discharge. (*Signed*) JOHN GOUGH.

III. *Form of Notice of Assignment.*

Dated Bridgwater,
October 27*th*, 1876.

To HENRY BANNISTER, ESQ.,
Barrow-in-Furness.

I hereby give you notice that by a memorandum in writing, dated the 27th of October 1876, John Gough, of this place, authorised and requested you to pay me the sum of £100 out of money due, or to become due, from you to him, and my receipt for the same shall be a good discharge. (*Signed*) WILLIAM BRICE.

[See *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569.]

IV. *Form of Assignment.*

July 31*st*, 1877.

To J. JOPLING, ESQ.

Dear Sir,—I hereby assign to Messrs. Robson & Son, boat builders, Sunderland, the sum of £40, or any other sum now due, or that may hereafter become due, in respect of the steam launch which I am building for you. I will thank you to hold the same at their disposal, and their receipt for the amount will be a full and sufficient discharge.—Yours truly, T. TATE.

[This letter was forwarded by Messrs. Robson & Son to Mr. Jopling, who replied as follows :]—

V. *Acknowledgment of Receipt of Notice of Assignment.*

August 1*st*, 1877.

To Messrs. ROBSON & SON,
Sunderland.

Dear Sirs,—I am in receipt of your letter, and Mr. Tate's order to pay you the sum of £40 on account of a boat he is building for me. This shall have my best attention when it is finished to my satisfaction. —Yours truly, J. JOPLING.

[See *Buck* v. *Robson*, 1878, 3 Q. B. D. 686.]

VI. *Formal Assignment of Book-Debts contained in a Bill of Sale.*

THIS INDENTURE, made the 13th of May 1905, between John Brown, of 10 Blank Street, Birmingham, packing-case manufacturer (hereinafter called "the Borrower"), of the one part; and William Smith, of 39 Newhall Street, Birmingham, aforesaid, gentleman (hereinafter called "the Lender"), of the other part: WITNESSETH, that in consideration of the sum of £500, now paid to the Borrower by the Lender (the receipt of which the Borrower hereby acknowledges), HE, the Borrower, doth hereby assign unto the Lender, his executors, administrators, and assigns, all and singular the stock-in-trade, fixtures, shop and office furniture, tools, machinery, implements and effects now being, or which, during continuance of this security, may be in, upon, or about the premises of the Borrower, situate at 10 Blank Street aforesaid, or any other place or places at which, during the continuance of this security, he may carry on business. And also all the book-debts due and owing, or which may during the continuance of this security become due and owing, to the Borrower, which stock-in-trade, fixtures, machinery, furniture, chattels, goods, effects, and debts are for the most part, and as near as may be, specified in the respective schedules hereunder written, by way of security for the payment of the sum of £500 and interest thereon at the rate of £5 per cent. per annum. AND the Borrower doth hereby covenant with the Lender, and agree and declare that HE, &c. [*here follow the covenants usually inserted in a bill of sale*].

PROVIDED ALWAYS that the chattels hereby assigned shall not be liable to seizure, or to be taken possession of by the Lender for any cause other than those specified in sec. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

IN WITNESS, &c.

Signed and sealed by the said John Brown in the presence of me, Edward Furness, 15 Colmore Row, Birmingham, Solicitor's Clerk.

THE SCHEDULES ABOVE REFERRED TO.

VII. *Informal Assignment contained in Correspondence.*

Kramrisch & Co., Liverpool,
January 6th, 1903.

Messrs. THE DUNLOP RUBBER COMPANY, LTD.

Dear Sirs,—We should thank you to kindly sign the attached letter and forward same to Messrs. Wm. Brandt's Sons & Co., London, E.C. —Yours very truly, KRAMRISCH & Co.

Dated London,
January 7th, 1903.

Dear Sirs,—Inclosed we beg to hand you a letter received from Messrs. Kramrisch & Co., Liverpool, referring to eight packages India-rubber, amounting to £369, 2s. 10d.; seventy-five packages India-rubber, amounting to £3263, 16s. 4d., which Messrs. Kramrisch & Co. advise having forwarded to you. We request you to kindly return to us the

counterpart duly signed by your good selves.—And remain, dear Sirs, yours truly, (*Signed*) WM. BRANDT'S SONS & CO.

The Dunlop Rubber Company, Ltd.,
Para Mills, Birmingham.

Para Mills, Birmingham,
January 8th, 1903.

Messrs. WM. BRANDT'S SONS & CO.,
4 Fenchurch Avenue, London, E. C.

Dear Sirs,—Herewith we beg to confirm that we shall remit, subject to approval of goods, the amount of invoice—

£369, 2s. 10d. for 8 }
£3263, 4s. 2d. for 75 } packages raw rubber, received to-day from Messrs. Kramrisch & Co., when due, direct to your good selves for Messrs. Kramrisch & Co.—Yours faithfully,

For the Dunlop Rubber Company, Ltd., Para Mills,
JOHN GOODING.
A. G. P.

[See *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C., at p. 456.]

Assignment of Dower.—See DOWER.

Assignment of Leases.—See COVENANTS IN LEASES; LANDLORD AND TENANT.

Assignment (of Property).—See BANKRUPTCY; BILLS OF SALE.

Assigns, or Assignees.—Those who are *assigned*, deputed, or appointed by the act of the party or the operation of law to do any act or enjoy any benefit on their own accounts and risks—an assignee being one that possesses a thing in his own right, but a deputy he that acts in right of another (Perkins). Assignee by deed is when a lessee of a term, etc., sells and assigns the same to another; that other is his assignee by deed; assignee-in-law is he whom the law makes so, without any appointment of the person, as an executor is assignee-in-law to the testator. For the law applicable to assigns, see COVENANT; EXECUTORS AND ADMINISTRATORS; LANDLORD AND TENANT; WILLS.

Assistance, Writ of.—The writ of assistance was the process of the Court of Chancery for the enforcement of a decree or order for delivery of possession of land. The terms of Order 13 of the Chancery General Orders of 26th August 1841 did not specially mention recovery of possession of land as the purpose of the writ, but provided that: "Upon due service of a decree or order for delivery of possession, the person prosecuting it shall be entitled to an order for a writ of assistance." In 1874, shortly before the Judicature Acts came into force, an order was applied for in Court for a writ of assistance to

issue for the recovery of chattels, and although the Vice-Chancellor regarded this application of the process as unprecedented, leave was granted (*Cazet de la Borde* v. *Othon*, 1874, 23 W. R. 110). This extension of the scope of a writ of assistance prior to the Judicature Acts has proved to be of permanent value, seeing that the Rules under those Acts make no provision for a writ of execution empowering the sheriff to seize specific chattels, and put the party prosecuting an order for delivery of chattels into possession of them. The writ of possession applies only to land, and the writ of delivery for the recovery of property other than land or money only empowers the sheriff to distrain the judgment debtor by all his lands and chattels until the specific chattels are delivered up. In 1888 a case arose in which chattels ordered to be delivered up were known to be in a certain place, but the judgment debtor had absconded and left no property which could be distrained. In these circumstances Chitty, J., held that, under Order 72, r. 2, of the Rules of the Supreme Court, the old practice was retained, and by virtue of the above case, and in view of the fact that there was no form of writ prescribed by the Rules of the Supreme Court which would be effective, the writ of assistance as applied to chattels remained in force, though as applied to land only it had been superseded by the writ of possession (*Wyman* v. *Knight*, 1888, 39 Ch. D. 165).

As to practice on issuing a writ of assistance, see EXECUTION.

FORM.

(*Title of Action.*)

EDWARD THE SEVENTH, &c.

To the Sheriff of , as well present as for the future, Greeting. Whereas according to the tenor and true meaning of an order made in a certain action depending in the Division of our High Court of Justice between , complainant, and , defendant, the said was ordered and enjoined to deliver up possession to , in the said order named, of certain chattels in the pleadings in the said action mentioned, yet nevertheless, he the said , and other ill-disposed persons, his accomplices, have refused to pay obedience thereto, and detain and keep the possession of the said chattels, in manifest contempt of us and our said Court: and whereas by an order made in the said action, bearing date the day of , it was ordered that a writ of assistance should issue directed to the sheriff of the county of , to put into possession of the chattels (*describing them*), pursuant to the said hereinbefore recited order. Know ye, therefore, that we, being willing and desirous that justice should be done to the said , in this behalf, do give unto you full power and authority to place and put the said , or his assigns, without delay, into the full, peaceable, and quiet possession of all and singular the said chattels, and from time to time, as often as there shall or may be occasion, to maintain and keep

him and his assigns in such peaceable and quiet possession, according to the intent and true meaning of the said orders of our said Court, and therefore we do hereby command and enjoin you, that immediately after your receipt of this writ, that you do place and put the said and his assigns into the full, peaceable, and quiet possession of the said chattels, and defend and keep him and his said assigns in such peaceable and quiet possession, when and as often as any interruption may or shall from time to time be given or offered to them or any of them, according to the true intent and meaning of the said orders, and herein you are not in anywise to fail. Witness, &c.

Indorsement.

Writ of Assistance.

—— *v.* ——

[*Name and address of the solicitor or party issuing the Writ.*]

Assize, Clerk of.—See CLERK OF ASSIZE.

Assize, Rents of.—The customary rent service of the freehold and copyhold tenants of manors, when fixed or assized in amount by custom or otherwise, were called *rents of assize*, in distinction to rents that remained arbitrary or variable. They were also called quit-rents, because they were paid instead of all other services, of which the tenant thereby became discharged or quit (Leake, *Uses and Profits of Land*, p. 288).

Assizes.—See CIRCUITS AND ASSIZES.

Assizes, Grand, Petty.—See CIRCUITS AND ASSIZES; GRAND ASSIZE.

Associates.—Officers of the old Common Law Courts, or of the circuits (*q.v.*), who were associated with the judges and clerks of assize (*q.v.*) in the commissions of jail delivery and Nisi Prius. Their duties were to keep the records of the Court; to attend the Nisi Prius sittings; prepare the list of cases; draw the jury ballot; take a note of the judgment; enter the verdict; make up the *postea*; deliver the record to the party entitled thereto; and, generally, to see that all matters relating to the trial of the cause, and the business of the Court, was duly conducted. By the Supreme Court of Judicature (Officers) Act, 1879, 42 & 43 Vict. c. 78, s. 8, the then existing associates in the Queen's Bench, Common Pleas, and Exchequer Divisions, were made Masters of the Supreme Court, and by sec. 6 were amalgamated with the Central Office. By the rules of December 1887, so much of the Summons and Order Department of the Central Office as had hitherto formed the Court Order Department was amalgamated with the Associates' Department, and by the rules of January 1894, the Associates' Department was amalgamated with the Crown Office Department of the Central

Office. A certain number of the Masters had attended Court as associates, but this practice was discontinued on the gradual reduction of the number of Masters; and the Statute Law Revision Act, 1894, 57 & 58 Vict. c. 56, repealed the 8th section of the Officers Act, 1879, by which the associates were named Masters, and thenceforward the duties of associates were discharged by the clerks of the Associates' Department, which formed part of the Crown Office Department of the Central Office, under the control of the King's Coroner, who also bears the title of Master of the Supreme Court. Their duties remain the same as before the Officers Act, 1879, subject to the changes in procedure introduced by the rules of Court.

As to entry of trials at assizes from district registries by the associate at the assize town, see Order 36, rr. 26, 27, of the Rules of the Supreme Court.

The associate's certificate of the result of the trial, which has taken the place of the *postea*, is the authority on which judgment is entered at the Writ, Appearance, and Judgment Department of the Central Office, after trials in London, or on circuit; but where the action is proceeding in a district registry, judgment is entered at the registry. The certificate, in actions tried in London, is obtained at the Associates' Department, and in actions tried at assizes, from the circuit associate.

Association, Articles of.—See COMPANY.

Association, Memorandum of.—See COMPANY.

Associations, Unlawful.—See SOCIETIES, UNLAWFUL.

Assumpsit.—This was one of the old forms of action which were swept away by the Judicature Acts. It was originally a species of "trespass on the case" (see ACTION ON THE CASE), but in more modern times was looked upon as a distinct cause of action (Stephen on *Pleading*, 7th ed., p. 13, note (*u*)). It was called *assumpsit* from the fact that, when the pleadings were in Latin, that word was always used by the plaintiff in his declaration as descriptive of the defendant's undertaking or promise (Chitty on *Pleading*, 7th ed., vol. i. p. 110). *Assumpsit* was an action for the recovery of damages, whether liquidated or unliquidated, for the breach of a contract not under seal (see *First Report of the Common-Law Commissioners*, 1851, p. 31). It lay for the breach of any *parol* or *simple* contract, either express or implied, and whether made orally or in writing (Chitty on *Pleading*, 7th ed., p. 111). Claims in actions of *assumpsit* were divided into what were known as *special counts* and *indebitatus counts* (*ibid.*, p. 295). A special count consisted, in general, of a statement of a contract on which the action was founded, either in the terms in which it was made or according to the legal effect of those terms, and, after averring the fulfilment of all conditions which were required in order to entitle the plaintiff to have the contract performed, proceeded to assign the particular breach of the contract which was complained of, and to allege any special damage suffered in consequence of such breach (Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 58 *et seq.*).

In general, *special counts* in *assumpsit* were employed in cases where damages were sought to be recovered for the non-performance of a *parol* or *simple* contract—as, for instance, in actions against a vendor for not delivering goods bought, or against a vendee for not accepting goods sold, or in actions for breach of promise of marriage, or for breach of a warranty of the quality of goods sold (*ibid.*, p. 114). These *special counts* were not, however, restricted to cases in which mere damages were sought to be recovered, but might also, in general, be used for the recovery of *simple* contract debts where it was desirable, for the purpose of obtaining admissions or for other reasons, to set out the terms of the contract (*ibid.*, p. 295).

An *indebitatus count* stated the cause of action by a general description, reserving the particular circumstances of the debt to be given in evidence, and to be explained, where necessary, by particulars of demand (Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 35).

The *indebitatus counts* were employed in ordinary cases of *simple* contract where the claim was of a mere pecuniary nature, and was founded upon an executed consideration (*ibid.*, p. 295; Wm. Saund., 1871 ed., vol. i. p. 366, note (*n*); and see CONTRACT); or, in other words, where a simple contract, express or implied, resulted in a money debt, and nothing remained to be done but to pay the amount (Bullen and Leake, *Precedents of Pleadings*, 3rd ed., p. 58). The *indebitatus counts* most frequently in use were in respect of debts for goods sold and delivered, goods bargained and sold, work done, money lent, money received, money paid, interest, and upon accounts stated. These counts were termed *common counts* or *common indebitatus counts* (*ibid.*, p. 35; Selwyn's N. P., 11th ed., p. 71), and in practice they were often joined with a special count founded upon the same cause of action.

Assumpsit, being an action on the case, was within the Statute of Limitations, 21 Jac. I. c. 16, s. 3, and could only be commenced and sued within six years next after the cause of such action (2 Wm. Saund., 1871 ed., pp. 391, 395; *Gibbs* v. *Guild*, 1881, 8 Q. B. D. 302; 9 *ibid.*, 67). See LIMITATION.

Assurance.—See ACCIDENT, BURGLARY, FIRE, LIFE, MARINE, and SICKNESS, ASSURANCE OR INSURANCE.

Assurance (of Personal Chattels).—See BILLS OF SALE.

Assurances.—The word *assurance* is used to denote and comprise every act in the law, and every instrument, whereby any estate or interest in realty may be conveyed *de novo* to a stranger, or whereby any estate or interest which is liable to impeachment or defeasance may be discharged from such liability, or whereby any estate or interest may be enlarged into a greater estate or interest. The general subject of assurances may be divided in various ways. The fourfold division of Blackstone into (1) by matter *in pais*, (2) by matter of record, (3) by special custom, and (4) by devise, is well known (2 Black. *Com.* 294). At the present day, when assurances by matter of record have been abolished, this division is no longer applicable. It is possible that the best method of exhibiting the nature of the principal assurances, whether

comprised or not comprised in the modern practice, may be found in reviewing them with regard to the source from which they respectively derive their power and validity. From this point of view they may be divided into **(I.)** Assurances taking effect by force of the common law; **(II.)** Assurances taking effect by force of the custom of particular places; and **(III.)** Assurances taking effect by force of particular statutes.

(I.) Assurances taking effect by force of the common law are divisible into—(1) Assurances by matter of record, which are (*a*) fines, and (*b*) common recoveries; and (2) Assurances by matter *in pais*, a phrase which signifies in the country, and, according to the common interpretation quoted by Blackstone, upon the particular land to which they related. These are—(*a*) a feoffment, by which alone estates in corporeal hereditaments in possession could be conveyed; (*b*) a grant by deed for the conveyance of incorporeal hereditaments, including estates in reversion, and in remainder, in corporeal hereditaments; (*c*) an exchange; (*d*) a release; (*e*) a confirmation; (*f*) a lease, or demise; and (*g*) a surrender. Information in detail relating to these different kinds of assurances cannot here be given, but will be found under their separate headings. Here it may be observed, that since a feoffment took effect at common law by mere delivery of the seisin, without the delivery or execution of any deed or other instrument, this supplies the reason for the introduction of the words "act in the law" into the above-given definition of an assurance.

(II.) With regard to assurances taking effect by force of the custom of particular places, it is to be observed that such customs, being in derogation from the common law, can exist in counties, honours, cities, boroughs, hundreds, and manors, but not in places or localities of less dignity and importance (Co. Lit. 110*b*, and Harg. note 2 thereon). [See by way of illustration, *Ramsden* v. *Dyson*, 1865, L. R. 1 H. L. 129.] Otherwise the common law, which is styled by Lord Coke "the common custom of the realm," would practically cease to exist. The most important and best known of these local customs relating to the validity of assurances, was the custom of devising lands by will; which was very commonly found in boroughs, in connection with that species of socage called burgage tenure, by which the burgesses held their freehold lands and tenements (Lit. s. 162). This supplies an example of a distinct species of assurance, unknown to the common law, but valid in particular places by virtue of local custom. Local custom more commonly affected the validity of assurances, by in some way enlarging or otherwise qualifying the effect of assurances, such as feoffments, which were well known to the common law. Of this, the most important and best-known example is the custom of the county of Kent, in connection with gavelkind lands, that an infant, whether male or female, not being below the age of fifteen years, and being seised in fee-simple by descent, may indefeasibly alienate them by feoffment; at all events for valuable consideration (Rob. *Gav.*, 5th ed., pp. 162 *et seq.*). The effect of the custom here is to enlarge the operation of the foeffment by its extension to cases not permitted by the common law. Sometimes local customs are found to affect common-law assurances by way of restriction. It was held in *Perryman's Case*, 5 Rep. 84, that a custom in the manor of Porchester, that a feoffment of lands held of the manor should be void unless presented at the next manor Court, was a good custom. Lord

Coke, in his report of that case, also mentions a custom of Lidford Castle, in the county of Kent, that a freeholder of inheritance cannot pass his freehold, except by surrender and admittance; but it is perhaps uncertain whether lands subject to such a custom would at this day be regarded as true freeholds.

(III.) The subject of assurances taking effect by force of particular statutes would supply material for a considerable treatise. Here it is only possible to give an outline of the most salient divisions of the class. —(1) So far as regards the bulk of the lands in the kingdom, a will comes under this head; for there existed no general power to devise lands until the enabling statutes, 32 Hen. VIII. c. 1, followed by the explanatory Act, 34 & 35 Hen. VIII. c. 5, which are commonly called the Statutes of Wills. They are now superseded by the Wills Act, 1837, 7 Will. IV., and 1 Vict. c. 26; and in addition there exist a number of other Acts and enactments, which affect the wills of special classes of persons such as 24 & 25 Vict. c. 114, relating to wills made by British subjects abroad, and certain parts of the Married Women's Property Acts, relating to the wills of married women; or which affect all wills in certain limited respects, such as the Thellusson Acts, 39 & 40 Geo. III. c. 98, restricting the power of accumulation (*q.v.*). (2) The Statute of Uses, as is well known, gave rise to a whole system of conveyancing, which owes its operation wholly or partly to the statute; and a great part of the modern practice still rests upon this foundation. This statute also gave rise to two kinds of assurances which, so far as the conveyance of the legal estate is concerned, were completely novel; namely, a Bargain and Sale (*q.v.*), and a Covenant to Stand Seised (see SEISED). (3) Every assurance made in practice at the present day of a freehold in possession owes a part at least of its validity to the Act 8 & 9 Vict. c. 106, s. 2, which enacts that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. This Act had been preceded by certain tentative enactments tending in the same direction, 4 & 5 Vict. c. 21, s. 1, and 7 & 8 Vict. c. 76, s. 2, now repealed. (4) Assurances made by married women and their husbands derive a part of their validity from the Fines and Recoveries Act, 1833, 3 & 4 Will. IV. c. 74, s. 77 *et seq.* (see ACKNOWLEDGMENT OF DEEDS); and assurances (other than instruments, whether wills or other appointments, made in exercise of a power) made either by women married after the 1st January 1883, or by women, whenever married, of property to which they become entitled after that date, owe their validity to the Married Women's Property Acts. (5) Assurances made by tenants for life, under the statutory powers conferred by the Settled Land Acts, owe their validity to sec. 20 of the Act of 1882. (6) There are in existence a number of enactments authorising conveyances to be made to or by particular persons or bodies of persons, for particular purposes; such as 5 & 6 Will. IV. c. 69, s. 6, relating to conveyances made by overseers and guardians of the poor [and such as conveyance of lands compulsorily taken by a company on the execution of a deed poll, 8 Vict. c. 18, s. 77].

It would be very difficult, and perhaps would serve no adequate purpose, to attempt an exhaustive treatment in detail of the subject of this article, even if space permitted such treatment. The triple outline above given will suffice to suggest the heads under which inquiry should

be pursued in any particular case. It will be seen to be possible for a given assurance to depend for its validity, partly upon the common law, partly upon local custom, and partly upon one or more statutes.

Asylum (Lat. *asylum;* Gr. ἄσῦλον, fr. ἀ, *priv.*, and σῦλον, *spoil*).—A sanctuary or place where there is safety from pursuit.

In ancient times, criminals were safe while within the bounds of temples and other sacred places, and out of this custom sprang a similar one of treating the precincts of Christian churches as places of refuge (see SANCTUARY).

The term has now passed into current usage, with the meaning of hospital, or place of shelter for the unfortunate, destitute, and insane. See ASYLUMS.

In international law the word has retained its old sense of a place of safety from pursuit. Thus the territory of a foreign State is an asylum for refugees, subject, however, to treaties of EXTRADITION (*q.v.*), and the right of EXPULSION (*q.v.*).

Another application of the term in international law is the cover extended by neutral territory to belligerent fugitives. The practice of States in this respect is fairly well defined, and differs when naval, as distinguished from land forces, are concerned.

The practice as regards land forces is as follows:—The neutral State may not allow its territory to serve for the purposes of a war between States with which it is at peace, but it may at all times receive individuals belonging to the belligerent States, and even belligerent forces, provided its hospitality and position as a neutral be respected. It is incumbent on the neutral State to take precautions to insure such respect and guard against the belligerent forces resuming hostilities. It is therefore usual to disarm refugee forces, and keep them under close supervision until the end of the war.

In maritime warfare the obligations of the neutral State are different. Thus a belligerent war vessel may seek refuge in a neutral port, and there undergo repair and take in coal and provisions, and the neutral State, in not preventing such vessel from resuming war operations, does not commit a breach of the law of nations. A rule, however, has grown up in the private law and practice of States, where hostile vessels meet in the same neutral port, of forbidding the one belligerent vessel to sail within twenty-four hours after the departure of the other. To prevent the abuse, moreover, of this right of refuge, a further rule was adopted by Great Britain in 1861, and repeated in 1870, requiring any belligerent vessel entering a British port to put to sea within twenty-four hours after entrance, except in case of stress of weather, or of her needing provisions or things necessary for the subsistence of the crew, or repairs, in any of which cases she was to be required to put to sea as soon as possible after the expiry of twenty-four hours. [The subject of the right of asylum in naval warfare has acquired importance recently in connection with the proceedings of the Russian fleet in the Russo-Japanese War. See NEUTRALITY.]

Asylums.

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Scope of Article.—It is proposed in this article to treat the law of lunacy and the law of local government in all their relations to the existing asylum system of England, using the term asylum, not in the restricted definition of it given in the Lunacy Act, 1890, as "an asylum for lunatics provided by a county or borough, or by a union of counties and boroughs" (s. 341), but in its wider and more general sense, as including every receptacle for the insane. The jurisdiction in lunacy and the civil capacity and criminal responsibility of the insane will be dealt with under LUNACY.

The present inquiry is as wide in range as it is important in character. It embraces, *inter alia*, an examination of the various modes in which insane persons are committed to an institution for lunatics, or placed under care, of their treatment, of the means by which, and the circumstances under which, they can be released or discharged, of the system of asylum administration and visitation, and an analysis of the powers and duties of local authorities in regard to the provision and maintenance of asylums. The subjects of criminal lunatic asylums, and of the effect of detention in an asylum on the settlement of pauper lunatics, also fall within its purview.

Reception of Lunatics.—Reception Orders on Petition.

Subject to the exceptions of urgency cases (see *infra*) and criminal lunatics (see *infra*), a person, not being a pauper or a lunatic so found by inquisition, cannot be received and detained as a lunatic in an institution for lunatics, or as a single patient, unless under a reception order made by "the judicial authority"—a term which will be explained immediately. A relative of the person applying for an order, or of the lunatic, or of the husband or wife of the lunatic, is not capable of making such order (s. 4, subs. (1)).

The detention of a lunatic is justifiable at common law if necessary for his safety or the safety of others (*Brookshaw* v. *Hopkins*, 1773, Lofft, 235-240; *Anderdon* v. *Burrows*, 1830, 4 C. & P. 210; *Scott* v. *Wakem*, 1862, 3 F. & F. 328; *Symm* v. *Fraser*, 1863, *ibid.* 859).

The term "single patient" is impliedly defined by sec. 315. No licence is necessary for the reception and detention of a single patient. The provisions of the Act with reference to single patients must, however, be complied with. See Commissioners' Circular as to, 1895. There is nothing in the Act to prevent the relatives of a lunatic from keeping and taking care of him. But the income of such a lunatic cannot be dealt with otherwise than under the authority of the jurisdiction in lunacy. See LUNACY.

The order is obtained upon a private application by petition, accompanied by a statement of particulars and by two medical certificates on separate sheets of paper (s. 4, subs. (2)). As to requisites of medical certificates, see *infra*.

The petition is to be presented, if possible, by the husband or wife or by a relative of the alleged lunatic. If not so presented, it must contain a statement of the reasons why the petition is not so presented, and of the connection of the petitioner with the alleged lunatic, and the circumstances under which he presents the petition.

This provision has a double object: first, to secure the presentation of the petition by a responsible person; and secondly, to lay a basis for an undertaking by the petitioner as to visitation.

There are cases in which the signature of the husband or wife or a relative of an alleged lunatic could not be obtained, if at all, in time. "For example," say the Commissioners in Lunacy in their 33rd Annual Report, at p. 129, "a foreigner, in good or fair circumstances, becomes insane, and unless his banker or agent, his fellow-clerk or the landlord of his hotel, comes forward to sign the order, he must be treated, to his manifest disadvantage, as a lunatic wandering at large or not under proper care or control, and must be sent, through the police or a relieving officer, to a pauper asylum, with, in all likelihood, especially in London, a preliminary detention in a workhouse."

In addition to the particulars mentioned in the subsection, an urgency order made before a petition is presented must be referred to in the petition (s. 11, subs. (5)). Moreover, if a previous petition has been dismissed, the facts relating to it, so far as known to the petitioner, must be given (s. 7, subs. (4)).

The wilful misstatement of any material fact in a petition is a misdemeanor (s. 317, subs. (1)). Proceedings before a justice of the peace upon a petition under the Lunacy Act, 1890, are, however, judicial proceedings, and, therefore, statements in the statement of particulars accompanying the petition are absolutely privileged (*Hodson* v. *Pare*, [1899] 1 Q. B. 455).

No person is competent to present a petition unless he is at least twenty-one years of age, and has within fourteen days before the presentation of the petition personally seen the alleged lunatic (s. 5, subs. (2)).

The date on which the petition is presented is excluded; that on which the petitioner last saw the alleged lunatic is included. "Days" means all days, including Sundays, etc.

The petitioner undertakes in the petition that he will personally, or by someone specially appointed by him, visit the patient once at least in every six months; and the undertaking is recited in the order.

The petition is signed by the petitioner, and the statement of particulars by the person making the statement (s. 5, subs. (4)).

On the presentation of the petition the judicial authority considers the allegations in the petition and statement of particulars and the evidence of lunacy appearing by the medical certificates, and whether it is necessary for him personally to see and examine the alleged lunatic; and, if he is satisfied that an order may properly be made forthwith, he may take it. If he is not so satisfied, he appoints as early a time as practicable, not being more than seven days after the presentation of the petition, for its consideration; and he may make such further or other inquiries concerning the alleged lunatic as he may think fit. Notice of the time and place appointed for the consideration of the petition (unless personally given to the petitioner) shall be sent to the petitioner by post in a prepaid registered letter addressed to him at his address as given in the petition.

The answers in the statement of particulars are not to be dissociated from the context, dissected into parts, and read as to each of those parts as if it had no relation to or dependence upon the rest. The statement will be construed as a whole, and if any dispute as to its sufficiency arise, the question will be whether, properly understood by a reasonable mind, it gives or does not give all the particulars which are required (*Lowe* v. *Fox*, 1887, 12 App. Cas. 206). The case from which this proposition is taken was decided under the Lunacy Act of 1853, 16 & 17 Vict. c. 96, sched. A, No. 1. But it is still valuable as an illustration. The plaintiff was taken to and detained in the defendant's asylum as a person of unsound mind, under an order signed by her husband, and containing a statement of questions and answers concerning her. To the question "Age," the answer was "Fifty." To the question "Whether first attack," the answer was "For the last twenty years has been subject to what is termed hysteria." To the question "When and where previously under care and treatment," the answer was "During this period of twenty years has been constantly under treatment." The House of Lords, affirming the decision of the Court of Appeal, held that the answers were sufficient and not misleading. If the lady had been subject to, and under treatment for, hysteria for twenty years, this was a fact which the person making the statement of particulars was entitled and bound to disclose. He mentioned the hysteria specifically, and excluded from his answer as to previous treatment all reference to "care," a term which would be applicable to patients under the care of a person who would restrain their liberty.

The fact that the judicial authority has or has not seen the patient is stated in the reception order (see Form 3, sched. ii.). In the latter case the alleged lunatic has a qualified right to demand examination by another judicial authority (see s. 8, subs. (1)).

The judicial authority, if not satisfied with the evidence of lunacy appearing by the medical certificates, may, if he thinks it necessary so to do, visit the alleged lunatic at the place where he may happen to be (s. 6, subs. (2)).

The petition is considered in private, and no one except the petitioner, the alleged lunatic (unless the judicial authority shall in his discretion otherwise order), any one person appointed by the alleged lunatic for that purpose, and the persons signing the medical certificates accompanying the petition, may, without the leave of the judicial authority, be present at the consideration thereof (s. 6, subs. (3)).

At the time appointed for consideration of the petition the judicial authority may make an order on it or dismiss it, or, if he thinks fit, may adjourn the case for any period not exceeding fourteen days for further evidence or information.

Every judicial authority has the same power as regards the summoning and examination of witnesses, the administration of oaths, and otherwise—a term which would include costs—as if he were acting in the exercise of his ordinary jurisdiction (s. 9, subs. (2)).

A County Court judge or a stipendiary magistrate is not required to act as a judicial authority so as to delay, or interfere with, the exercise of his ordinary jurisdiction (s. 9, subs. 3)). And as to how this exemption is to be claimed, see Lord Chancellor's and Home Office Rules.

Every judicial authority and all persons admitted to be present at the consideration of any petition for a reception order, or otherwise having official cognisance of the fact that a petition has been presented, except the alleged lunatic and the person appointed by the alleged lunatic, is bound to keep secret all matters and documents which may come to his or their knowledge by reason thereof, except when required to divulge the same by lawful authority (s. 6, subs. 5)).

An obligation of secrecy is imposed on the Commissioners, except when removed by "lawful authority," or by their sense of what is necessary for the better execution of their duties, or by the dismissal of a petition or the release of a lunatic, in so far as they think fit (s. 7, subs. (3)).

An obligation of secrecy is imposed on the judicial authority, except when removed by "lawful authority," as, for instance, under sec. 7, subs. (2).

An obligation of secrecy is imposed on the secretary and clerks to the Lunacy Commissioners, or assistants to clerk of visitors, except when removed by "lawful authority."

In *Hill* v. *Philp*, 1852, 7 Ex. Rep. 232, a case decided under the Lunacy Act, 1845, an order for inspection of documents was held to be *legal* authority. An order for interrogatories, or for production of documents, would fall within the same category. The word *lawful* was probably used as being wider than *legal*.

If the petition is dismissed, the judicial authority delivers to the petitioner a statement in writing under his hand of his reasons for dismissing it, and sends a copy of such statement to the Commissioners in Lunacy, and also, where the alleged lunatic is detained under an urgency order, sends notice by post or otherwise to the person in whose charge the alleged lunatic is, that the petition has been dismissed (s. 7, subs. (1)).

When an order has been made, the lunatic may be received into any institution for lunatics, and the reception order, if in form, and accompanied by the requisite medical certificates, is a sufficient authority for his reception.

When a lunatic has been received as a private patient under an order of a judicial authority, without a statement in the order that the patient has been personally seen by the judicial authority, the patient has a right to be taken before or visited by a judicial authority, other than the judicial authority who made the order, unless the medical officer of the institution, or, in the case of a single patient, his medical

attendant, within twenty-four hours after reception, in a certificate signed and sent to the Commissioners in Lunacy, states that the exercise of such right would be prejudicial to the patient (s. 8, subs. (1)).

The lunatic is entitled to notice of his right to demand an interview within twenty-four hours after reception, and a manager of an institution or person in charge of a patient failing, whether wilfully or otherwise, to give such notice imposed upon him by this section is guilty of a misdemeanor (s. 8, subs. (5)). As to punishment of misdemeanor where no special punishment is prescribed, see Stephen, *Dig. Crim. Law*, art. 22; and *Dunn* v. *R.*, 1848, 12 Q. B. 1041.

The judicial authority, after personally seeing the patient, reports his opinion to the Commissioners in Lunacy, who may take such steps as may be necessary to give effect to the report (s. 8, subs. (3)).

The Judicial Authority defined.—The judicial authority for the purposes of the Act is a justice of the peace specially appointed by the justices of every county and quarter sessions borough annually, or a judge of county courts, or magistrate, the two last of whom, however, may decline to act if doing so would interfere with their ordinary jurisdiction (see ss. 9, 10, 11 of Act of 1890, and 24 and 25 of Lunacy Act, 1891).

The judicial authority has the same jurisdiction and power as regards the summoning and examination of witnesses, the administration of oaths, and is assisted by the same officers, as if he were acting in the exercise of his ordinary jurisdiction (s. 9, subs. (2)).

Reception under Urgency Orders.

In cases of urgency where (and only where, see *In re Cathcart*, [1893] 1 Ch. 475) it is expedient, either for the welfare of a person (not a pauper) alleged to be a lunatic, or for the public safety, that the alleged lunatic should be forthwith placed under care and treatment, he may be received and detained in an institution for lunatics, or as a single patient upon an urgency order (in force for seven days, or, if a petition for a reception order is pending, till it is finally disposed of (s. 11, subs. (6)), made (if possible) by the husband or wife, or by a relative of the alleged lunatic, accompanied by one medical certificate (s. 11, subs. (1)). If not related to the patient, the person signing the order must state the reason why the order is not signed by a relation, his or her connection with the patient, and the circumstances under which he or she signs (s. 11, subs. 3)).

No person may sign an urgency order unless he is at least twenty-one years of age, and has within two days before the date of the order personally seen the alleged lunatic (s. 11, subs. (4)).

Procedure by way of urgency order was borrowed from the Scotch "emergency certificate." It is proposed by legislation now before Parliament to reduce the period of duration of an urgency order to four days.

Reception after Inquisition.—A lunatic so found by inquisition (see LUNACY) may be received in an institution for lunatics or as a single patient upon an order signed by the committee of the person of the lunatic, or if no committee has been appointed, upon an order signed by a Master in Lunacy (s. 12).

Summary Reception Orders.—A summary reception order is an order

for the reception of a lunatic, made by a justice otherwise than upon petition (s. 19). There are four classses of cases in which such orders are made—

(1) Lunatics not under proper care and control, or cruelly treated or neglected.

(2) Resident pauper lunatics.

(3) Lunatics wandering at large.

(4) Lunatics in workhouses who are proper subjects to be removed to an asylum.

(1) *Lunatics not under Proper Care, etc.*—Any such justice, upon the information on oath of any person whomsoever that a person, not a pauper and not wandering at large, is deemed to be a lunatic and is not under proper care and control, or is cruelly treated or neglected as aforesaid, may himself visit the alleged lunatic, and shall, whether making such visit or not, direct and authorise any two medical practitioners whom he thinks fit to visit and examine the alleged lunatic and to certify their opinion as to his mental state, and the justice shall proceed in the same manner so far as possible, and have as to the alleged lunatic the same powers as if a petition for a reception order had been presented by the person by whom the information with regard to the alleged lunatic has been sworn (s. 13, subs. (2)).

Upon the certificates of the medical practitioners who examine the alleged lunatic, or after such other and further inquiry as the justice thinks necessary, he may by order direct the lunatic to be received and detained in any institution for lunatics to which, if a pauper, he might be sent, and the constable, relieving officer, or overseer upon whose information the order has been made, or any constable whom the justice may require so to do, shall forthwith convey the lunatic to the institution named in the order (s. 13, subs. (3)). A constable, relieving officer, or overseer whose duty it is, under the Act of 1890, to convey a lunatic to or from an institution for lunatics, may make proper arrangements for the performance of the duty by some other person or persons (Act of 1891, s. 2, subs. (1)).

The order, if in proper form, is a sufficient authority for the reception and detention of the lunatic (s. 25, subs. (1)). Its execution may, however, be suspended, or the lunatic may be temporarily removed to the workhouse. Except in such cases, however, the order ceases to be operative unless the lunatic is received under it within seven clear days (see CLEAR DAYS) from its date (s. 36, subs. (3)).

(2) *Resident Pauper Lunatic.*—Every medical officer of a union who has knowledge that a pauper resident within the district of the officer is or is deemed to be a lunatic and a proper person to be sent to an asylum, must, within three days after obtaining such knowledge, give notice in writing to the relieving officer of the district, or, if there is no such officer, to an overseer of the parish where the pauper resides (s. 14, subs. (1)).

The medical officer need not go further than common report, in his notice, either as to the alleged lunacy or as to the propriety of sending the party to an asylum.

Every relieving officer and every overseer of a parish of which there is no relieving officer, who respectively have knowledge, either by notice from a medical officer or otherwise, that any pauper resident within the district or parish of the relieving officer or overseer is deemed to be a

lunatic, is required, within three days after obtaining such knowledge, to give notice thereof to a justice having jurisdiction in the place where the pauper resides (s. 14, subs. (2)).

Lunacy is not sickness within the meaning of art. 215 of the General Consolidated Order, so as to entitle the relieving officer to give the lunatic medical relief.

If a constable, relieving officer, or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic, with regard to whom it is his duty to take proceedings, that the alleged lunatic should be placed under care and control, he may remove the alleged lunatic to the workhouse of the union in which he is, and the master of the workhouse, unless there is no proper accommodation in the workhouse for the alleged lunatic, may "receive and relieve, and detain" the alleged lunatic therein. No person is to be so detained for more than three days, and before the expiration of that time the constable, relieving officer, or overseer must take such proceedings with regard to the alleged lunatic as are required by the Act (s. 20).

Either deficiency of room or absence of proper arrangements for the care and control of a dangerous lunatic would be a sufficient ground for refusal. If the master of the workhouse refuse to receive the lunatic on the ground of want of proper accommodation, steps should be at once taken to bring the lunatic before a justice, who may, (*a*) if he think fit, inquire into the circumstances, and if satisfied that there is proper accommodation, deal with the case under sec. 21; or (*b*) send the lunatic to an asylum, under sec. 16, if he consider that the case is not a workhouse one.

The words "relieve" and "alleged" give the master of the workhouse authority to incur and recover necessary outlay on behalf of the party brought to him for reception and detention, even if the latter is found by the justices not to be a lunatic at all. Independently of this enactment, however, such expenses are recoverable as "necessaries" at common law.

Any justice may make an order for removal of a lunatic to a workhouse in any case where a summary reception order might be made, if he is satisfied that it is expedient for the welfare of the lunatic, or for the public safety, that the lunatic should forthwith be placed under care and control, and if it appears to him that there is proper accommodation for the lunatic in that workhouse (s. 21, subs. (1)).

Authority to "relieve" is implied in the order to take charge of and detain the lunatic, and expenses incurred in relieving the lunatic are recoverable as "necessaries," even if the party is afterwards found to be sane (*West Ham Union* v. *Pearson*, 1890, 62 L. T. 638).

The justice, upon receiving the notice, has the alleged lunatic brought before him or some other justice having jurisdiction in the place where the pauper resides, within three days (s. 14, subs. 3). The justice has power to examine the alleged lunatic at his own house or elsewhere (s. 17). In *R.* v. *Whitfield*, 1885, 15 Q. B. D. 122, the justices endeavoured to see the alleged lunatic at a library where he happened to be, in order to avoid remark.

(3) *Lunatics wandering at Large.*—Every constable and relieving officer and every overseer of a parish who has knowledge that any person (whether a pauper or not) wandering at large within the district or parish of the constable, relieving officer, or overseer is deemed to be

a lunatic, must immediately apprehend and take the alleged lunatic, or cause him to be apprehended and taken before a justice (s. 15, subs. (1)).

Wandering at large means wandering aimlessly without any definite ideas as to destination.

The justice before whom a pauper alleged to be a lunatic or an alleged lunatic wandering at large is brought is required to call in a medical practitioner and examine the alleged lunatic, and make such inquiries as he thinks advisable, and if upon such examination or other proof the justice is satisfied in the first-mentioned case that the alleged lunatic is a lunatic and a proper person to be detained, and in the secondly-mentioned case, that the alleged lunatic is a lunatic, and was wandering at large, and is a proper person to be detained, and if in each of the foregoing cases the medical practictioner who has been called in signs a medical certificate with regard to the lunatic, the justice may by order direct the lunatic to be received and detained in the institution for lunatics named in the order (s. 16).

A lunatic sent to an institution for lunatics under this provision is classified as a pauper, until it is ascertained that he is entitled to be classified as a private patient (Act of 1891, s. 3).

Any justice, whether specially appointed or not, upon the information upon oath of any person that a person wandering at large within the limits of his jurisdiction is deemed to be a lunatic, may by order require a constable, relieving officer, or overseer of the district or parish where the alleged lunatic is, to apprehend him and bring him before the justice making the order, or any justice having jurisdiction where the alleged lunatic is (s. 15, subs. (2)).

The examination must be a *real* one, *i.e.* an examination made personally and *bonâ fide* by the justice for the purpose of satisfying himself as to the sanity or insanity of the person examined. The time, and place, and manner, and character, and duration of the examination are one and all left to his discretion, and he will not be considered as having acted without jurisdiction by reason only of his having made a less full and complete examination than the Court may think he ought to have made. Nor is it necessary that the medical practitioner above referred to should be actually present when the justice sees and personally examines the alleged lunatic, or that the latter should be made aware of the object of the examination. "The language" [of the section], said Lindley, L.J., in *R.* v. *Whitfield*, 1885, 15 Q. B. D. 149, 150, "does not point to anything like such an investigation as takes place under a writ *de lunatico inquirendo*. The object of the statute is not to enable justices to adjudicate a person to be *non compos mentis*, but to enable them to place under proper care and control persons who they are satisfied are lunatics, and require to be so placed. They have to act in cases of emergency and of great danger, as well as in other cases; their measures are precautionary measures only; if they make a mistake, it can soon be corrected. . . . Moreover, it must never be forgotten, in dealing with the insane, that the whole object of such an examination as justices could be expected to make, would frequently be frustrated by informing the insane person that justices were about to examine him with reference to his insanity. The statute has given justices of the peace and medical men large powers; but the statute is based upon the theory that they can be trusted."

A justice is not to sign an order for the reception of a person as a

pauper lunatic into an institution for lunatics, or workhouse, unless he is satisfied that the alleged pauper is either in receipt of relief, or in such circumstances as to require relief for his proper care. A person who is visited by a medical officer of the union, at the expense of the union, is, for the purposes of this section, to be deemed to be in receipt of relief (s. 18).

In the case of a lunatic as to whom a summary reception order may be made, a relation or friend may retain or take the lunatic under his own care if a justice having jurisdiction to make the order, or the visitors of the asylum in which the lunatic is or is intended to be placed, is satisfied that proper care will be taken of the lunatic.

The limitation of the definition of "relative" in the case of the presentation of petitions (see s. 6, subs. (1)) or the signing of reception orders (s. 11, subs. (1)) is intelligible enough. But here the policy of the Act is to encourage offers on the part of any relation or friend of an alleged lunatic to undertake to maintain him; and therefore, as the justice must be satisfied that proper care of the lunatic will be taken, there can be no objection to making the definition of relation as wide as possible.

Reception Order by Two Commissioners in Lunacy.—Any two or more Commissioners may visit a pauper lunatic or alleged lunatic not in an institution for lunatics or workhouse, and may make a reception order on the certificate of a medical practitioner.

(4) *Lunatics in Workhouses.*—Except in the cases mentioned below, no person is allowed to remain in a workhouse as a lunatic unless the medical officer of the workhouse certifies in writing—(*a*) that such person is a lunatic, with the grounds for the opinion; and (*b*) that he is a proper person to be allowed to remain in a workhouse as a lunatic; and (*c*) that the accommodation in the workhouse is sufficient for his proper care and treatment, separate from the inmates of the workhouse not lunatics, unless the medical officer certifies that the lunatic's condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that he should be kept separate.

The excepted cases are—(1) the urgent cases referred to in ss. 20 and 21; (2) the case of a pauper suffering from mental disease as to whom before the commencement of the Act of 1890 an order has been made under sec. 22 of the Poor Law Amendment Act, 1867 (see s. 4, subs. (1) of the Act of 1891); (3) the case of a lunatic detained in an asylum provided under the Metropolitan Poor Act, 1867, where no certificate as to sufficiency of accommodation is required (Act of 1891, s. 4, subs. (2)); and (4) the case of a lunatic transferred to such an asylum from a workhouse while a certificate or order made in regard to him there is in force. Here no further certificate or order is required for his detention (*ibid.*). (2) (3) and (4) arise under the Act of 1891, but that statute is to be construed as one with the Act of 1890 (see s. 1 of the Act of 1891). No lunatic is to be detained for more than fourteen days in a workhouse against his will, except under the order of a justice (s. 24, subs. (3)), supported by the certificate of a medical practitioner (s. 24, subss. (3) and (4)) not an officer of the workhouse, and by the certificate of the medical officer.

There are to be attached to every order made by a justice under sec. 24 of the Act of 1890 the medical certificates on which such order is founded (s. 5, Act of 1891). This last provision facilitates the keeping

of the orders and certificates together for inspection by the Commissioners in Lunacy.

Where a pauper lunatic is discharged from an institution for lunatics, and the medical officer of the institution is of opinion that the lunatic has not recovered, and is a proper person to be kept in a workhouse as a lunatic, the medical officer shall certify such opinion, and the lunatic may thereupon be received and detained against his will in a workhouse without further order on the certificate of the medical officer of the workhouse (s. 25).

Chronic lunatics, not being dangerous, who are in an asylum and have been selected and certified by the manager of the asylum as proper to be removed to the workhouse, may be so removed by order of the visitors of the asylum, with the consent of the Local Government Board (s. 26, subs. (1)).

The object of the subsection is to enable visitors, by the removal of chronic patients, to make provision for the removal into asylums of all recent and probably curable cases. The application must originate with visitors. No application received directly from a Board of Guardians can be entertained (Minute, 25th November 1863, 18th Rep. Commissioners in Lunacy, 74).

Lunatics so received under this section continue patients on the books of the asylum for the purposes of the Act of 1890, so far as it relates to lunatics removed to asylums (*ibid.* subs. (2)).

These purposes are: the removal of a lunatic to a workhouse under this section is not to affect his subsequent treatment (ss. 39-53), removal (ss. 58 *et seq.*), discharge (ss. 72 *et seq.*), or chargeability (ss. 286 *et seq.*), or the rights of the guardians in regard to his property (ss. 299, 300). As to examination of lunatics in workhouses, see Circular of L. G. B., 1st June 1896.

Institutions in which Lunatics may be received.—Subject to the restrictions—(1) that a lunatic is not to be sent to an asylum out of the place from which he is sent unless on the ground of deficiency of room or for special circumstances (s. 27, subs. (2)); (2) that a pauper lunatic is not to be received into an asylum other than an asylum belonging wholly or in part to the county or borough in which the place where he is or is settled is situated, except under a subsisting contract (subs. (3)); every summary reception order, and every reception order made by two or more Commissioners, may authorise the reception of the lunatic named in the order not only into an asylum of the county or borough in which the place from which the lunatic is sent is situate, but also into any other institution for lunatics. As to workhouses situate in county, not including union, see Lunacy Act, 1891, s. 6.

As to removal of lunatic becoming pauper, see Act of 1891 (see s. 19).

Requirements of Reception Orders and Medical Certificates.—A medical certificate (*a*) must be made and signed by a medical practitioner (s. 28, subs. (1)). "Medical practitioner" means a medical practitioner (1) duly registered under the Medical Act, 1858, 21 & 22 Vict. c. 90, and the Acts amending the same, and the Medical Act, 1886, 49 & 50 Vict. c. 48; and (2) *semble*, residing within the jurisdiction (s. 341); (*b*) where a reception order is founded on, must state the facts upon which the certifying medical practitioner has formed his opinion,

distinguishing facts observed by himself from facts communicated by others (s. 28, subs. (2)); (*c*) if accompanying an urgency order, must contain a statement that it is expedient for the welfare of the alleged lunatic, or for the public safety, that he should be forthwith placed under care and treatment, with the reasons for such statements (s. 28, subs. (3)).

The medical practitioner who signs the medical certificate, or where two certificates are required, each medical practitioner who signs a certificate, must have personally examined the alleged lunatic in the case of an order upon petition not more than seven (and, see s. 29, subs. (3), in the case of an urgency order, not more than two) clear days before the date of the presentation of the petition, and in all other cases not more than seven clear days before the date of the order (s. 29, subs. (1)).

Where two medical certificates are required, each medical practitioner signing a certificate must examine the alleged lunatic separately from the other (s. 29, subs. (2)).

The petitioner or person signing the urgency order, the husband or wife (see 39 & 40 Vict. c. 41), father or father-in-law, mother or mother-in-law, son or son-in-law, daughter or daughter-in-law, brother or brother-in-law, sister or sister-in-law, partner or assistant of such petitioner or person, are disqualified for signing (s. 30). The usual medical attendant should if possible sign one certificate in the case of a private patient (s. 31).

Sec. 32 of the Act of 1890 disqualifies from signing certificates persons, and the relatives by blood or marriage, and the partners or assistants, of persons, who have a professional interest in the institutions or houses into which the patients concerned are to be received. It completes the re-enactment and extension (in conformity with the suggestion of the Commissioners in Lunacy in their 33rd Annual Report, p. 130) of sec. 12 of the Lunacy Act, 1853, and sec. 76 of the Lunatic Asylums Act, 1853. Commissioners and medical visitors are also disqualified (s. 33).

Sec. 34, subs. (1), provides for amendment of orders and certificates by the person signing the order or certificate. Subs. (2) provides for the initiative being taken by the Commissioners, but extends only to certificates. An amendment under this section when made and sanctioned relates back to the date of the order or certificate (subs. (3)).

No amendment can be made after fourteen days (which means all days, Sundays, etc., included) from the reception, and the power of the Commissioners to require amendments in certificates is subject (see subs. (2)) to the condition that the certificate must be duly amended within fourteen days after the reception.

A patient detained under an order or certificate, materially defective (as to what are material defects, see *Lowe* v. *Fox*, 1887, 12 App. Cas. 206), and not amended in the prescribed manner within fourteen days after the reception, will be discharged if the Commissioners think fit (subs. (2), and ss. 75 and 76), and is also entitled to bring an action for false imprisonment against the person receiving and detaining him.

A reception order is a sufficient justification (*a*) for the conveyance of the lunatic by the petitioner, or someone authorised by him, or in the case of an order not made on petition, by the person named in the order, to the place mentioned; (*b*) for his reception and detention there;

and (*c*) for his recapture if he escapes (see s. 85). The order affords a good justification, although the person named in it is not in fact insane (*Norris* v. *Seed*, 1849, 3 Ex. Rep. 782; 77 R. R. 831, and *Mackintosh* v. *Smith*, 1865, 4 Macq. H. L. Cas. 913). The patient in such case may obtain release by *habeas corpus* or by application to the Commissioners in Lunacy (s. 75).

Duration of Reception Orders.—A reception order expires at the end of one year from its date, unless extended by the Commissioners in the case of institutions for lunatics, or the patient is re-certified (as to extension by Commissioners, see s. 38, subss. (2) and (4); as to re-certification, see Act of 1891, s. 7). The detention of a lunatic after expiry of a reception order is a misdemeanor (s. 38, subs. (7)).

Care and Treatment.

Private Patients.—A report as to the mental and bodily condition of the patient is to be sent to the Commissioners in Lunacy at the expiration of a month after reception (s. 39, subs. (1)). In the case of licensed houses, a copy of this report is laid before the visitors. Elaborate provision is made for visiting of the patients in both cases thereafter (s. 39); special visits may also be paid, and the Commissioners may make orders for discharge (*ibid.*).

Mechanical Restraint.—"Mechanical means of bodily restraint" (as to meaning of which, see Regulations of Commissioners in Lunacy, 1895) are not to be applied to any lunatic, unless the restraint is necessary for purposes of surgical or medical treatment, or to prevent the lunatic from injuring himself or others (s. 40, subs. (1)); and there are provisions for a medical certificate being granted after the use of restraint, describing the means and occasion of its exercise (*ibid.* subss. (2) and (3)), also for records of all cases of such exercise being kept (*ibid.* subss. (4) and (5)); as to the use of "the pack," see the case of *Thomas Weir*, Parl. Pap., 1895, c. 395.

Correspondence.—The manager of every institution for lunatics, and every person having charge of a single patient, is required to forward unopened all letters written by any patient and addressed to the Lord Chancellor or any Judge in Lunacy, or to a Secretary of State, or to the Commissioners, or any Commissioner, or to the person who signed the order for the reception of the patient, or on whose petition such order was made, or to the Chancery Visitors or any Chancery Visitor, or to any other visitors or visitor, or to the visiting committee, or any member of the visiting committee of the institution, in which any patient writing such letters may be, and may also at his discretion forward to its address any other letter if written by a private patient (s. 41, subs. (1)). A penalty of £20 (maximum) is prescribed for contravention of the provision as to correspondence (*ibid.* subs. (2)). Notices as to the rights of private patients to have letters forwarded, or interviews with Commissioners, are to be posted up in institutions for lunatics (see Order of Commissioners, 14th May 1890); a maximum penalty of £20 is prescribed for offences (*ibid.* subs. (4)).

A certifying practitioner may not be the regular medical attendant of a private patient (s. 43, subs. (1)). A Commissioner or visitor is also disqualified for professional attendance (subs. (2)).

Any one of the Commissioners in Lunacy, as to patients confined in

an institution for lunatics or other place (not being a jail) authorised to be visited by the Commissioners, and any one of the visitors of a licensed house, as to patients confined in such house, may at any time give an order in writing under his hand for the admission (either for a limited number of times or at all reasonable times) to any patient of any relation or friend, or of any medical or other person whom any relation or friend desires to be admitted to him (s. 47).

The words "other person" cover the case of persons who are not relations or friends, but who, for instance, are representatives of societies interesting themselves in preventing abuses of the lunacy law. But in such cases the Commissioners would probably refuse to make any order, on the ground that the applicants had no *locus standi*. The proper course for such persons to adopt is to apply to have the patient examined under sec. 49 *inf.* There is a maximum penalty of £20 for obstruction or refusal of admission by a manager, unless he has reasonable ground for such refusal.

Sec. 49 of the Lunacy Act, 1890, adopting the Scotch practice, provides that any person may, with the sanction of the Commissioners, on showing good cause for the step, send two medical men at any time to test the condition of any patient under restraint. The Act also provides for inquiries (*a*) by the Lord Chancellor, through the Masters in Lunacy; or (*b*) the Commissioners *ex proprio motu*, as to property of persons detained as patients (s. 50), and for searches as to whether a particular person has been confined (s. 51).

The employment of males in the personal custody of females, except on occasions of urgency, is prohibited under a maximum penalty of £20 (s. 53).

Any two visitors of an asylum, with the advice in writing of the medical officer (compare Rules of Commissioners in Lunacy, 1895, r. 19, (2)), may permit a patient in the asylum to be absent on trial so long as they think fit (s. 55, subs. (1)). The authority under which a patient was sent to an asylum does not need to be renewed during his absence on trial, although the ordinary time for its expiration arrives (see s. 37, subs. (2)); and if he does not return at the expiration of his leave, he may be retaken, as in the case of an escape (see s. 55, subs. (8)). An allowance may be made to a pauper lunatic during absence (s. 55, subs. (2)).

The manager of any hospital or licensed house may (*a*) send or take, under proper control, any private patient, or two or more private patients, to any specified place, or to travel in England, for such period as may be thought fit for the benefit of his or their health; (*b*) permit a private patient to be absent upon trial for such period as may be thought fit.

The previous consent is required of a Commissioner, or in the case of a hospital of two members of the managing committee, or in the case of a house licensed by justices of two of the visitors (s. 55, subs. (4)); and it is generally necessary to obtain and produce to the consenting authority (*ibid.* subs. (5)) the approval in writing of the person on whose petition the reception order was made, or by whom the last payment on account of the lunatic was made. Similar powers as to granting absence on leave are possessed by Commissioners as regards hospitals and licensed houses, and by two visitors in the case of houses licensed by justices (*ibid.* subs. (6)); also by persons in charge of single patients, with previous consent of Commissioners (s. 56).

Boarding-out Lunatics.—The visiting committee of an asylum may give over to the custody of a relative or friend any pauper lunatic confined in such asylum, if the guardians of the union to which the lunatic is chargeable or the local authority liable for his maintenance approve (s. 57, subs. (1)).

The authority liable for the maintenance of the lunatic is to pay to the person to whom the lunatic is delivered a reasonable allowance for maintenance, not exceeding the expenses which would be incurred on his account if he were in the asylum (s. 57, subs. (2); and see s. 24, subs. (2) (*f*), of the Local Government Act, 1888).

Removal of Lunatics.—The Lunacy Acts provide for the removal (1) of private patients or single patients from an institution for lunatics or private charge by the person authorised to discharge the patient (s. 58 of Act of 1890), or by Commissioners; (2) of single patients, on death of person so having charge of the lunatic (s. 59 *ibid.* subs. (2)); (3) of lunatics in workhouses, by Commissioners, subject to a right of appeal by guardians to a Secretary of State (s. 60 *ibid.* subss. (1) and (2)); (4) of a pauper lunatic in a hospital or licensed house, by the authority liable for his maintenance (s. 61, subs. (1)), to the workhouse of the union to which the lunatic is chargeable, or if the lunatic is chargeable to a county or borough, to the workhouse of the union from which he was sent to the hospital or licensed house (Act of 1891, s. 11); (5) of a lunatic boarded out into an asylum, by the visiting committee (s. 63); (6) of a pauper into a county asylum, by two justices (s. 64); (7) of a pauper from an asylum into an institution for lunatics, by two visitors, subject to restrictions (as to which, see s. 67).

Removal orders are in duplicate, and are a sufficient authority to the person executing them (s. 70, subs. (2)).

An alien lunatic may be sent back to his own country, by Secretary of State's warrant, on the initiative of his friends (s. 71, subs. (1)).

A Secretary of State's warrant is a sufficient authority to the master of any vessel to receive and detain the lunatic on board and convey him to his destination (s. 71, subs. (2)).

Discharge of Lunatics.—A private patient detained in an institution for lunatics, or under care as a single patient, may be discharged if the person on whose petition the reception order was made, by writing under his hand, so directs (s. 72, subs. (1)).

The discharge of a lunatic may be obtained by *habeas corpus ad subjiciendum*. The writ may be issued either during the sittings or in vacation, and be made returnable at Chambers in vacation. An affidavit in support of the application is necessary from the party who claims the writ, or else an affidavit from some other person to the effect that the party on whose behalf the writ is claimed is so coerced as to be unable to make an affidavit (*Canadian Prisoners' Case*, 1839, 3 St. Tri. N. S. 963), and that the party promoting the application was duly authorised by the lunatic (*Ex parte Child*, 1854, 15 C. B. 238). The Court has jurisdiction in virtue of sec. 5 of the Judicature Act, 1890, 53 & 54 Vict. c. 44, to grant costs against the unsuccessful party upon an application for a writ of *habeas corpus* (*R.* v. *Jones*, 1894, 63 L. J. Q. B. 656). A person applying *bonâ fide*, or apparently *bonâ fide*, for a writ of *habeas corpus* ought to be shown the documents under which the detention is justified (*In re J. G. Dell*, 1891, 35 Sol. J. 783; *In re Carter*, 1893, 95 L. T. Jo. 37). See further as to *habeas corpus*, Short and Mellor's *Practice of the Crown*

Office, p. 335, and Wood and Renton on *Lunacy*, pp. 242 and 1082. Or, if that person is dead or incapable—and in the case of a pauper originally classified as a private patient—the person who made the last payment on account of the patient, or the husband or wife, or if there is no husband or wife, or the husband or wife is incapable as aforesaid, the father, or if there is no father, or he is incapable as aforesaid, the mother of the patient, or if there is no mother, or she is incapable, then any one of the nearest of kin of the patient (*ibid.* subs. (2)); or, in default, the Commissioners in Lunacy.

A pauper in a hospital or licensed house may be discharged by the authority liable for his maintenance (s. 73).

A patient is not to be discharged in the last two cases in the face of an adverse certificate of the medical officer or medical attendant, without the written consent of the Commissioners in Lunacy (s. 74).

The Acts also provide for the discharge by visitors of lunatics in a licensed house and of patients in asylums (ss. 77 and 78), for the discharge of paupers by relatives or friends (s. 79)—notice of discharge being given to the relieving officer of the union to which the lunatic is chargeable, or the clerk of the local authority liable for his maintenance (s. 80, subs. (1)), a provision enacted in consequence of *Liverpool Overseers* v. *Lancaster Lunatic Asylum*, 1880, 5 Ex. D. 215—and for the discharge from workhouses by the guardians (s. 81).

Any person who considers himself to have been unjustly detained as a lunatic is entitled, on his discharge, to obtain from the Secretary to the Lunacy Commissioners, free of expense, a copy of the documents on which he was confined (s. 82).

Patients are, of course, entitled to discharge on recovery (see s. 83).

Every coroner shall, upon receiving notice of the death of a lunatic within his district, if he considers that any reasonable suspicion attends the cause and circumstances of the death, summon a jury to inquire into the same (s. 84).

A *post-mortem* examination may be ordered whether an inquest is held or not, and the Commissioners in Lunacy, in their 35th (p. 83) and 36th (p. 90) Annual Reports, have placed great emphasis on the importance of such examinations being held in all cases. As to fees of medical practitioners in connection with coroners' inquests, or *post-mortem* examinations, see sec. 22 of the Coroners Act, 1887.

Escape and Recapture.—If any person detained as a lunatic under the Act of 1890 escapes, he may, without a fresh order and certificate or certificates, be retaken at any time within fourteen days after his escape by the manager of the institution for lunatics, or the master of the workhouse in which he was detained, or any officer or servant thereof respectively, or by the person in whose charge he was as a single patient, or by anyone authorised in writing by such manager, master, or person (s. 85).

As to penalties on managers, etc., for permitting an escape, see sec. 323. As to notices on escape and recapture, see rule 23 of the Rules of the Commissioners in Lunacy, 1895. As to escape from England to Scotland or Ireland, see sec. 86; from Scotland into England or Ireland, s. 87; from Ireland into England or Scotland, ss. 88 and 89.

The retaking may be justified under an order and certificate in proper form, although the person named therein is not a lunatic (*Norris* v. *Seed*, 1849, 3 Ex. Rep. 782).

Visitation of Asylums.—Apart from the incidental visitation of asylums by Commissioners and visitors in consequence of the special reports as to mental and bodily condition already referred to, and the incidental visitation of lunatics, so found, by the order of the Masters in Lunacy (a subject which will be dealt with in the article on LUNACY), the English lunacy law provides a complete system for the regular periodical visitation of every kind of receptacle for the insane. The duties of visitation are divided between the Commissioners in Lunacy, the Chancery Visitors, and various other visitors and visiting committees, the respective powers and positions of whom must now be briefly described.

The Commissioners in Lunacy.—There are ten Commissioners—four unpaid and six paid, of whom three are legal and three are medical, appointed and removable by the Lord Chancellor. A medical Commissioner must be a medical practitioner (s. 150, subs. (1))—no standing in point of time nor any requirement that he should be in actual practice is prescribed as a qualification. A legal Commissioner must be a practising barrister of not less than five years' standing (s. 151, subs. (2)). A paid Commissioner is not allowed to hold or carry on any other office or any profession or employment from which any profit is derived (s. 150, subs. (3)), and a Commissioner is disqualified if he is, or within one year prior to his appointment has been, interested in a licensed house (s. 158, subs. (1)), or becomes so (*ibid.* subs. (2)). Each of the paid Commissioners receives a salary of £1500 a year. The Commissioners in Lunacy have a secretary—a barrister of not less than seven years' standing—who is eligible for a legal Commissionership, and receives a salary of £800 a year—and an office of their own at 19 Whitehall Place, London, S.W.

The Chancery Visitors.—There are three Chancery Visitors—two medical and one legal, appointed and removable by the Lord Chancellor, and each receiving a salary of £1500 a year. The qualification of a medical visitor is that he should be a medical practitioner in actual practice, and of a legal, that he should be a barrister of not less than five years' standing (s. 163). A Chancery Visitor is not to be engaged in the practice of his profession, and is disqualified by having been within two years preceding his appointment, or by becoming directly or indirectly, interested in a licensed house (s. 165). The Chancery Visitors and the Masters in Lunacy (as to whom, see article LUNACY) together form a Board, and have offices in the Royal Courts of Justice (s. 167). The Lord Chancellor has power under the Act of 1890 to amalgamate the three lunacy departments above described, or any two of them (s. 337).

Visiting Committees of Asylums.—Every asylum has a visiting committee of not less than seven members, appointed by the local authority (s. 169), usually at its quarterly meeting in November. Each visiting committee holds office till the election of their successors (s. 172), and members of visiting committees are not to be interested in contracts entered into, or work done for, the committees (s. 174, subs. (1)). These prohibitions do not, however, extend to the position of shareholder in a company (*ibid.* subs. (2)). The meetings of visiting committees of county councils are governed by sec. 82 of the Local Government Act, 1888. As to meetings of other visiting committees, see sec. 175, subs. (2) of Act of 1890.

The staff of an asylum consists of a chaplain (in priest's orders),

licensed by the bishop (who has power to revoke the licence) (see *R.* v. *Justices of Middlesex*, 1842, 2 Q. B. 445 ; 57 R. R. 728), a resident medical officer, a superintendent, a clerk, and a treasurer—all appointed by the visiting committee (s. 276). As to pensions and superannuation of officers, see secs. 280-282, and Poor Law Officers' Superannuation Act, 1896. Lunatics of a religious persuasion other than that of the Church of England may be visited by a Nonconformist minister of their own persuasion (see sec. 276, subs. (2)).

Visitors of Licensed Houses.—The justices of every county and quarter sessions borough not within the immediate jurisdiction of the Commissioners (as to which, see sec. 208, subs. (1)) annually appoint three or more justices, and also one medical practitioner, or more, to act as visitors of licensed houses within the county or borough (s. 177, subs. (1)).

A person is not qualified to be a visitor or clerk, or assistant-clerk, to any visitor, who is, or within one year prior to his appointment has been, interested in a licensed house (*ibid.* subs. (3)), and the acquisition of such an interest is a disqualification.

The annual appointment of visitors is made by justices of a county at their Michaelmas Quarter Sessions, and by justices of a borough at Special Sessions, to be held in the month of October ; other appointments may be made by justices of a county at any Quarter Sessions, and by justices of a borough at Special Sessions, to be held at the same time as any Quarter Sessions (s. 177, subs. (7)).

A visitor cannot be appointed by the justices of a borough without the consent in writing of the recorder of the borough (s. 180).

The visitors meet at such times and places as they may think proper (s. 181, subs. (1)).

Duties of Chancery Visitors.—The Chancery Visitors visit lunatics so found by inquisition at such times and in such rotation and manner as the Rules in Lunacy, or as any special order of the Judge in Lunacy, direct (s. 183, subs. (1)).

Every lunatic is personally visited and seen by one of the Chancery Visitors twice at least in every year, and the visits are so regulated that the interval between successive visits in no case exceeds eight months (*ibid.* subs. (2)). Every lunatic resident in a private house is, during the two years next following inquisition, visited at least four times in every year.

The Chancery Visitors also visit persons alleged to be lunatics, on the direction of the Judge in Lunacy.

The Chancery Visitors, after each visit, make a report in writing of the state of mind and bodily health, and of the general condition, and also of the care and treatment, of each person visited, and these reports are submitted to the Lord Chancellor (s. 185, subs. (1)).

The Chancery Visitors may make separate or special reports (subs. (2)).

The reports of the Chancery Visitors are filed and kept secret in their office, are not open to the inspection of any person save the members of the board of visitors, and the Judge in Lunacy, and such persons as he specially appoints (s. 186 subs. (1)).

And all the reports relating to any particular patient are destroyed on his death, or on the inquisition being superseded, or being vacated and discharged on a traverse, unless the Judge in Lunacy, within fourteen days after the supersedeas, or the vacating and discharge on a

traverse, specially orders that they be not destroyed until the lunatic's death (subs. (2)). As to such reports, see *Roe* v. *Nix*, [1893] P. 55.

Visitation of Lunatics in Asylums.

Two or more Commissioners, one medical and one legal, once at least in each year visit every asylum and make inquiries as to the condition of the patients, etc. (s. 187, subs. (1)).

Any one or more of the Commissioners may at any time visit any asylum with the like powers (s. 187, subs. (2)).

At least two members of the visiting committee together, once at least in every two months, inspect every part of the asylum, and see every patient therein, so as to give everyone, as far as possible, full opportunity of complaint (s. 188).

A single member of the committee has no power of visitation in the case of asylums. *Aliter*, as regards licensed houses within the jurisdiction of visitors appointed by justices, see sec. 193, subs. (1).

Lunatics received under a contract are visited by two or more members of the visiting committee at least once in every six months (s. 189).

The visiting committee lay before each local authority to which the asylum belongs, at their quarterly meeting in November, or at such other time as the local authority appoint, a report in writing of the state and condition of the asylum, etc. (s. 190, subs. (1)), and a copy of this report is to be sent to the Commissioners in Lunacy by the clerk to the visiting committee within twenty-one days after it has been laid before the local authority (Rules of the Commissioners in Lunacy, 1895, r. 30).

Lunatics in Hospitals and Licensed Houses.—Every hospital and licensed house may at any time, by day or night, be visited by any one or more of the Commissioners (s. 191, subs. (1)).

Every licensed house within the immediate jurisdiction of the Commissioners (see sec. 208, subs. (1)) is visited six times a year, namely : (*a*) four times by not less than two Commissioners, one medical and one legal; and (*b*) twice by one or more of the Commissioners (s. 191, subs. (2)).

Every licensed house not within the immediate jurisdiction of the Commissioners shall be visited twice a year by not less than two Commissioners, one medical and one legal (subs. (3)).

Every hospital is visited once a year by not less than two Commissioners, one medical and one legal (subs. (4)).

Every licensed house within the jurisdiction of visitors appointed by justices may at any time, by day or night, be visited by one or more of the visitors (s. 193, subs. (1)), and must be visited (*a*) four times a year by not less than two of the visitors, of whom one is to be a medical practitioner; and (*b*) twice a year by one or more of the visitors.

As to the chief heads of the Statutory Inquiry, see Appendix Q. to the 32nd Report of the Commissioners in Lunacy, and p. 88 of that Report.

The inquiries of all the visitors are to be facilitated by the asylum authorities, and penalties are prescribed for concealment (s. 195, subs. (1)) and obstruction (s. 321).

Visits to Single Patients.—Single patients in unlicensed houses are visited once at least in every year by one or more Commissioners (s. 198).

The county or borough visitors have power to visit single patients detained in unlicensed houses in the county or borough (s. 199, subs. (2)).

Visits to Paupers in certain Cases.—Paupers in institutions for lunatics may be visited by a medical practitioner appointed by the guardians of a union and also the guardians of any union, between eight in the morning and six in the evening (s. 201, subs. (1)).

Every pauper lunatic not in an institution for lunatics, once a quarter is visited, if not resident in a workhouse, by the medical officer of the union or district in which the lunatic is resident, and, if resident in a workhouse, by the medical officer of the workhouse (s. 202, subs. (1)).

A pauper lunatic is a lunatic (definition of, s. 341) who is in receipt of relief.

Any one or more of the Commissioners may at any time visit workhouses in which there is or is alleged to be any lunatic (s. 203).

The Local Government Board institutes from time to time inquiries with reference to lunatics in workhouses, in virtue of its general control over its officers.

Special Visits.—Special visits may also be ordered from time to time by the Commissioners, the Lord Chancellor, or the Home Secretary (s. 204).

Lunatics in Private Families and Charitable Establishments.—These cases may be visited by the Commissioners, who may report in regard to any of them to the Lord Chancellor, who may make an order for the discharge of any patient (s. 206).

The comprehensive scheme of asylum visitation which has thus been described works admirably in practice. Visitors of every grade have complete powers of inquiry, and the combination of periodical with unexpected visitation, which is the main characteristic of the modern English asylum system, prevents the occurrence of abuses in any appreciable number of cases.

Licensed Houses.—One of the problems of asylum administration which has long perplexed lunacy reformers, has been whether private houses licensed for the reception of insane persons should be continued. The objection to institutions of this kind derives its force to some extent from historical causes. It was in private madhouses that the worst abuses of the old asylum system flourished, and the impression that such abuses were inherent in the "private profit" principle has survived all the successful efforts of reformers to eradicate them from the English asylum system. The principle of "private profit" has, however, its disadvantages, although these are counterbalanced by the fact that the proprietor of a licensed house has a greater incentive to hasten the cure of his patients and see to their comfort than the paid officials of an asylum.

Under the Lunacy Act, 1890, the Commissioners in Lunacy exercise the licensing jurisdiction in the following places:—The cities of London and Westminster, the counties of London and Middlesex, and the following parishes and places—Barnes, Kew Green, Mortlake, Merton, Mitcham, and Wimbledon, in the county of Surrey; Southend, in the county of

Kent; and East Ham, Leyton, Leytonstone, Low Leyton, Plaistow, West Ham, and Walthamstow, in the county of Essex; and also every other place, if any, within the distance of seven miles from any part of the cities of London or Westminster, or of the borough of Southwark (s. 208, subs. (1), and third schedule).

In all places not within "the immediate jurisdiction" of the Commissioners, the licensing jurisdiction is exercised by the justices for every county and quarter sessions borough. The policy of the present lunacy law in regard to licensed houses has been—(1) While making provision for the protection of licensed houses in the course of being established at the passing of the Lunacy Act, 1889 (on which the Act of 1890 is based), and for the substitution of new for existing houses, to prohibit the grant of new licences (s. 208); and (2) to impose stringent conditions on the grant of licences in the limited class of cases which it preserved.

Conditions on which Licences are Granted.

Before a licence is in any case granted for a house not within the immediate jurisdiction of the Commissioners, and not previously licensed, the Commissioners inspect and report upon its suitability (s. 210).

A licence is not granted unless the licensee, or one of the licensees, undertakes to reside in the house (s. 211). As to licences to joint-licensees, see sec. 112.

No addition or alteration is to be made to any unlicensed house or its appurtenances without the previous consent in writing of the Commissioners, and also of two of the visitors in the case of a house within the jurisdiction of visitors (s. 213). The wilful making of any untrue statement, etc., by an applicant for a licence to the Commissioners is a misdemeanor (s. 214).

Licences and renewed licences are stamped with a ten shilling stamp, and are under the seal of the Commissioners, or the hands of three or more of the licensing justices, as the case may be, in Quarter or Special Sessions assembled, and are granted for a period not exceeding thirteen months.

In addition to the stamp, the sum of ten shillings for every patient not a pauper, and the sum of two shillings and sixpence for every pauper patient, are payable by licensees; and if the total amount of such sums of ten shillings and two shillings and sixpence does not amount to fifteen pounds, then so much more is to be paid as makes fifteen pounds (s. 217).

Where a licence is granted for less than thirteen months, the payment may be reduced to any sum not less than five pounds (s. 217, subs. (3)).

The payment for a licence for a new house granted upon the transfer of patients from a licensed house is not less than one pound (exclusive of the stamp) (*ibid.* subs. (4)).

Notice on change of house is to be given to the person on whose petition the reception order of each private patient was made, or by whom the last payment on account of the patient was made, and to the authority liable for the maintenance of each pauper patient (s. 219).

The penalty for infringing a licence is fifty pounds for each patient (s. 220).

The Lord Chancellor may revoke, or prohibit the renewal of, a licence on the recommendation of the licensing Commissioners or justices (s. 221). The detention of patients after the expiration or revocation of a licence is a misdemeanor (s. 222).

Moneys received for licences by clerks of the peace are paid into the county or borough fund, as the case may be (s. 224). And as to audits of accounts, see *ibid.* subs. (3), s. 225; and also sec. 66 of the Local Government Act, 1888.

In every house licensed for one hundred patients, or more, there is resident as the manager and medical officer thereof a medical practitioner (s. 228, subs. (1)).

Every house licensed (*a*) for less than one hundred, and more than fifty, patients (in case the house is not kept by, or has not, a resident medical practitioner) is visited daily by a medical practitioner (*ibid.* subs. (2)); (*b*) for less than fifty patients (in case the house is not kept by, or has not, a resident medical practitioner) is visited twice a week by a medical practitioner (*ibid.* subs. (3)); (*c*) for less than eleven lunatics may, by the written authority of the Commissioners, be visited at greater intervals, not more, however, than once in every two weeks.

As to the reception of boarders into licensed houses, see secs. 229 and 230 of Act of 1890, and sec. 20 of the Act of 1891.

Registered Hospitals.—When the agitation against the system of licensed houses was at its height, it was suggested by a select committee of the House of Commons, appointed in 1877 to inquire into the working of the lunacy law, that a mean might be adopted between the two extreme views. They considered that no alteration in the law was necessary, but that the matter had better be left to the spontaneous action of the public; and that when there was sufficient accommodation for all classes in public institutions, such as existed in Scotland, in Cornwall, and at Cheadle in Cheshire, it was possible that there would be no demand for licensed houses for the upper and middle classes. In this opinion the committee concurred, and suggested that legislative facilities should be afforded by enlargement of the powers of magistrates or otherwise for the extension of this system.

The provisions of sec. 207, summarised above, and of sec. 231, are intended to carry out this recommendation. The former section at once protects vested interests, and makes provision for licensed houses in the course of being established at the passing of the Act of 1889, and for the substitution of new for existing houses, and prohibits the grant of new licences. The latter deals with the registration of hospitals. "Hospital" is defined as any hospital or part of a hospital or other house or institution (not being an asylum) wherein lunatics are received and supported wholly or partly by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients for or towards the support, provision or benefit of other patients.

Every hospital is to have a resident medical practitioner as its superintendent and medical officer (s. 230).

When application is made for the registration of a hospital for the reception of lunatics, the Commissioners depute any one or more members of their body to inspect it, and report to them (s. 231, subs. (1)).

If the Commissioners are of opinion that the hospital ought not to be registered, they shall report to the Home Secretary, who finally determines the point (*ibid.* subs. (2)). If they are of opinion, or the Home Secretary determines, that the hospital ought to be registered, the Commissioners issue a provisional certificate of registration (*ibid.* subs. (3)), valid generally for six months from its date (*ibid.* subs. (4)).

Within three months from the date of the provisional certificate, the managing committee of the hospital frame regulations, and submit them to the Home Secretary (*ibid.* (5)). And see sec. 12 of Lunacy Act, 1891, as to power of managing committee to alter regulations.

Upon approval of the regulations by the Home Secretary, the Commissioners issue a complete certificate of registration, specifying the total number of patients of each sex who may be received (*ibid.* subs. (6)); and the total number of patients and boarders, if any, may at no one time exceed that number (subs. 8)).

A superintendent who receives a patient contrary to these provisions is guilty of a misdemeanor (*ibid.* subs. (10)).

There is a provision in the Lunacy Act, 1891 (s. 21), for the protection of persons resident in the neighbourhood of registered hospitals against inconvenience from patients being allowed to go outside without a sufficient number of officers to control them.

As to superannuation allowances, see sec. 235 of Act of 1890.

No medical or other officer of a hospital, and no person interested or participating (otherwise than as a shareholder of a company) in the profits of any contract with, or work done for, the managing committee of a hospital, is qualified to be a member of that committee (s. 236).

The accounts of every registered hospital which does not submit its accounts to the Charity Commissioners are audited once a year by an accountant or auditor approved by the Lunacy Commissioners (s. 234, subs. (1)).

County and Borough Asylums.—Obligation to provide Asylums.

Every "local authority," a term which means, in this connection, the council of every administrative county and county borough respectively constituted under the Local Government Act, 1888 (sec. 240 of Act of 1890), and the council of each of the following boroughs:—Barnstaple, Bedford, Berwick-on-Tweed, Bridgewater, Bury St. Edmunds, Cambridge, Colchester, Doncaster, Grantham, Gravesend, Guildford, Hereford, King's Lynn, London (City of), Newark, Newbury, Newcastle-under-Lyme, New Sarum, New Windsor, Penzance, Poole, Rochester, Scarborough, Shrewsbury, Tiverton, Warwick, Wenlock, Winchester, or, in the case of the City of London, the common council (sched. iv., Act of 1890), is under an obligation to provide and maintain asylums (s. 238).

Modes in which this Obligation may be Discharged.

(1) A local authority may discharge this obligation in all or any of the following ways:—By (*a*) providing and maintaining an asylum alone; (*b*) agreeing to unite with any other local authority or local authorities in providing and maintaining a district asylum, or for the joint use as a district asylum of any existing asylum (s. 242, subs. (1)).

An agreement to unite needs the approval of the Home Secretary.

There are further provisions for contracts between the councils of county boroughs and visiting committees for the reception of pauper lunatics (s. 243, subs. (2-4)). Such contracts also need the approval of the Home Secretary (*ibid.* subs. (4)).

Where a county borough has contributed to the cost of building and furnishing a county asylum, the existing liability of the borough council shall continue until a new arrangement is made (s. 244, subs. (1)) (as to the terms and effect of such arrangements, see sec. 244, subs. (2)), and there is power under s. 14 of the Lunacy Act, 1891, to refer questions arising, to arbitration or to the Court. If the former alternative is adopted the provisions of sec. 62, subs. (5) (6) and (7), of the Local Government Act, 1888, apply (sec. 15 of Act of 1891). Where a borough contracts with a county, the powers of the borough to provide an asylum cease on the determination of the contract (s. 246). Boroughs annexed to counties contribute to the expense of providing asylums (sec. 13, subs. (1), Act of 1891). This last provision embodies the law in relation to the maintenance of borough lunatics (*In re Howlett* v. *Mayor, etc., of Maidstone*, [1891] 2 Q. B. 110). The boroughs in question are deprived of their power to create asylums, and, instead, are bound to send their lunatics to the county asylums, and to contribute sums fixed by agreement or arbitration, under sec. 62 of the Local Government Act, 1888.

The Home Secretary has power to enforce the obligations resting on local authorities in regard to asylum accommodation (s. 247).

Agreements to Unite.—Agreements to unite are required to state—(*a*) the number of visitors to be chosen by each contracting party; (*b*) the proportion in which the expenses are to be borne and the basis upon which such proportion is fixed (as to this see also sec. 249); (*c*) in case of joint user of an existing asylum, the sum to be paid towards expenses already incurred (s. 248, subs. (1)).

The statutory form of agreement to unite will be found in Form 21, sched. ii., Act of 1890.

An agreement to unite is reported and delivered to the clerk of the local authority within whose administrative area the asylum to which it relates is, or is to be, situated (s. 251), and a visiting committee is then elected (s. 253). A visiting committee empowered to provide asylum accommodation has wide incidental powers with regard to the purchase of lands (the Lands Clauses Acts are incorporated, except the provisions as to the purchase of lands otherwise than by agreement, the sale of superfluous lands, the recovery of forfeitures, etc., according to the special Act, s. 260) and buildings (s. 254, subs. (1)), subject to the check of the necessary approval of a Secretary of State (*ibid.* subs. (2)). Among the powers above referred to are additions to asylums for private patients (s. 255), enlargement of district asylums (s. 257), the provision of burial-grounds (s. 258); as to the burial of lunatics, see sec. 259, and consult the following cases:—*R.* v. *Stewart*, 1840, 12 Ad. & E. 773; *R.* v. *Price*, 1884, 12 Q. B. D. 253; *Andrewes* v. *Cawthorne*, 1744-45, Willes, 536; *Dean of Exeter's Case*, 5 Anne, 1 Salk, 334.

Rating of Asylums.—Lands and buildings purchased or acquired for the purposes of any asylum, and buildings erected on them, are, while used for those purposes, assessed to county, parochial, district and other rates on the same basis and to the same extent as other lands and buildings in the same parish, township, or district.

The local authority will therefore be considered as a hypothetical yearly tenant, and any profits which it may make by the admission of pauper lunatics from other counties or boroughs (ss. 243 and 269), or of private patients (ss. 241 and 271), or by the sale of produce of land cultivated by the patients as part of the curative regimen of the asylum, will be taken into account in the assessment.

In a county or borough lunatic asylum such parts of the premises as are occupied by the medical superintendent, medical officers, steward, chaplain, and other officers of the asylum whose income exceeds £150 a year, come within the scope of the Income Tax Acts. Such premises are not entitled to the benefit of the exemption in favour of Crown property solely used for Crown purposes (*Bray* v. *Justices of Lancashire*, 1889, 22 Q. B. D. 484). See now exemptions from assessment to income tax under secs. 34 and 35 of the Finance Act, 1894, 57 & 58 Vict. c. 30. See further as to rating of asylums to (*a*) inhabited house duty (*Cawse* v. *Nottingham Lunatic Asylum*, [1891] 1 Q. B. 585; *Needham* v. *Bowers*, 1888, 21 Q. B. D. 436); (*b*) income tax (*St. Andrew's Hospital, Northampton* v. *Shearsmith*, 1887, 19 Q. B. D. 624).

As to the powers of visiting committees in regard to repairs, alterations and improvements, see sec. 266 of Act of 1890.

Dissolution of Agreement to Unite.—A visiting committee, with the consent of the Home Secretary, may, by a resolution passed by a majority of the whole number of members, dissolve an agreement to unite (s. 267, subs. (1)). Before the dissolution takes effect a committee must be elected, by each local authority concerned (subs. 2)), to fulfil the statutory obligations as to asylum accommodation.

Upon the dissolution of an agreement to unite, the visiting committee may divide the real and personal property held for the purposes of the agreement among the several local authorities, in the proportion of their respective contributions (*ibid.* subs. (4)).

The Lunacy Acts also contain provisions for the cancellation of contracts (s. 268), and for the admission of pauper lunatics from other counties or boroughs under reception contracts (see sec. 269 of Act of 1890, and also sec. 17 of Act of 1891).

Admission of Private Patients.—Private patients may be received into any asylum upon such terms as to payment and accommodation as the visiting committee think fit (s. 271, subs. (1)).

As to financial arrangements, see subs. (2) *ibid.*

Borrowing Powers.—For the purposes of its powers, the local authority may, with the consent of the Local Government Board, and subject to the provisions of the Local Government Act, 1888, and the Municipal Corporations Act, 1882, borrow on the security of the county or borough fund, and of any revenue of the local authority, or on either such fund or revenues or on any part of the revenues, such money as the local authority require (s. 274, subs. (1)).

Expenses of Pauper Lunatics.—Weekly Expenses.

Every visiting committee is required to fix a weekly sum, not exceeding fourteen shillings, sufficient to defray the expenses of maintenance and other expenses of each pauper lunatic in the asylum (s. 283, subs. (1)). This limit applies even in the case of pauper lunatics other than those sent from or settled in a parish or place,

within the county or borough to which the asylum belongs (*Fitch* v. *Bermondsey Guardians*, [1905] 1 K. B. 524).

An extra sum, if needed, may be fixed by the local authority (*ibid.* subs. (2)).

Where there is more than one asylum under the control of a visiting committee a uniform charge is to be made in the several asylums (s. 284). As to whom an overplus of profits belonged to, see *Proctor* v. *Cheshire County Council*, 1892, 56 J. P. 532.

Medical Fees and other Expenses.—Whenever a lunatic or alleged lunatic, whether a pauper or not, is examined by a medical practitioner, the justice directing the examination, or any other justice having jurisdiction in the place where the examination took place, may make an order upon the guardians of the union named in the order for payment of reasonable remuneration to the medical practitioner, and of all other reasonable expenses in and about the examination and the inquiry.

The guardians may recover any sums paid under the order against the lunatic or alleged lunatic and his estate, and the person liable for his maintenance (s. 285), in the case of orders for maintenance under this Act. The maintenance of a pauper lunatic in an asylum by the guardians of the poor of the parish to which he is chargeable constitutes a debt of the lunatic to the guardians, and six years' arrears of maintenance from the commencement of the action may alone be recovered (*In re Watson; Stamford Union* v. *Bartlett*, [1899] 1 Ch. 72).

Liability for Expenses of Maintenance.—Expenses of maintenance are the reasonable charges of lodging, maintenance, clothing and care (s. 287, subs. (1)). The law is as follows:—Where a pauper lunatic is sent to an institution for lunatics, or a lunatic in such a union becomes a pauper (see sec. 22 of the Act of 1891, and *Ipswich Union* v. *Macclesfield Union*, 1890, 55 J. P. 134), he is chargeable to the union from which he was sent till the settlement has been adjudicated, or cannot be ascertained, and the manager of the institution gives notice of his destitution to the authority liable for his maintenance (s. 286, subs. (1)). *Semble*, the liability of the union for the maintenance dates from the time that such notice is given.

The justice by whom any pauper lunatic is sent to any institution for lunatics, or any two justices of the county or borough in which the institution for lunatics where any pauper lunatic is confined is situate, or from any part of which any pauper lunatic has been sent, or any two justices, being visitors of such institution, may make an order, retrospective or prospective, or partly the one and partly the other, upon the guardians of the union to which the lunatic is chargeable, for payment to the treasurer or manager of the institution, of the expenses of maintenance of such lunatic (s. 287). There is no appeal against any such order (*ibid.* subs. (3)).

The guardians are not, however, left without redress. They may relieve themselves from liability, under secs. 288 and 289, by showing that the lunatic has a legal settlement, which two justices have power to inquire into and adjudge, and in adjudging which they would make an order for payment of all expenses incurred, and for the maintenance of the lunatic, upon the guardians of the union or settlement; or, under s. 290, if it cannot be ascertained where the lunatic is settled, by applying for and obtaining an order of two justices upon the treasurer

of the local authority within whose area the lunatic was found, for those expenses and his maintenance (see *per* Cockburn, C.J., in *R.* v. *Recorder of Northampton*, 1865, 6 B. & S. 660-1).

All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics, who would at the time of his removal have been exempt from removal to the parish of his settlement or the country of his birth, under the Poor Removal Act, 1846, as amended by subsequent Acts, are to be paid by the guardians of the union in which the lunatic has acquired such exemption (s. 294).

For the general conditions of irremovability, see article POOR LAW. There are, however, some special points with reference to the effect of detention in an asylum on the settlement of pauper lunatics which must be noted here.

The mere bodily removal of a lunatic, while unable to exercise any will of his own, is no break of residence (see *R.* v. *Whitby*, 1870, L. R. 5 Q. B. 325). The removal of a pauper lunatic to a lunatic asylum under the provisions of any Act relating to the maintenance and care of pauper lunatics is not deemed a removal within the meaning of the Poor Removal Act, 1846.

The period of a wife's confinement in an asylum at the cost of the guardians must be excluded in computing the time of the husband's residence (*R.* v. *St. George's, Bloomsbury*, 1863, 32 L. J. M. C. 217). Periods, however, in such a case, during which the wife, enjoying lucid intervals, resided with her husband, who received at those times no relief, may be put together, so as to constitute the period of residence necessary to confer upon him the status of irremovability (see *Ipswich* v. *West Ham*, 1887, 20 Q. B. D. 407).

The removal of any lunatic pauper to an asylum, licensed house, or registered hospital, under the authority of the statutes in that behalf, or of any pauper, otherwise than under an order of removal, from his place of abode in any parish of a union to the workhouse of such union, shall not be deemed an interruption of the residence of such pauper within the meaning of the Poor Removal Act, 1846; but the time spent in such lunatic asylum, licensed house, or registered hospital, or workhouse respectively, and the time during which any person shall be relieved at the charge of the common fund of the union, shall be wholly excluded from the computation of the time of residence which, according to the provisions of such statute, will exempt a poor person from being removed (Poor Law Amendment Act, 1849, 12 & 13 Vict. c. 103, s. 4).

Charges may be paid without the orders of justices (s. 295), and the liability of the relations of pauper lunatics is not affected by the provisions, above summarised, as to their maintenance (s. 296). See also sec. 299, and *In re Bethell*, 1899, 80 L. T. 492, in which it was held that justices acting under this section are not a Court of summary jurisdiction, and have, therefore, no power to state a case.

As to expenses of the removal, discharge, and burial of pauper lunatics, see sec. 297.

Appeals.—Any person aggrieved by the refusal of an order by any justice or justices as to expenses of maintenance, etc., of this Act, may appeal to a Court of Quarter Sessions (s. 301, subs. (1)). The determination of the Court is final (*ibid.* subs. (2)).

The guardians of any union may appeal against any order adjudging

the settlement of a lunatic, to the Quarter Sessions for the county or borough on behalf of which the order has been obtained, or in which the union obtaining the order is situate, or, in case such union extends into several counties, then to the next Quarter Sessions for the county or borough in which the institution for lunatics where the lunatic is or has been confined is situate. Such Sessions have full power finally to determine the matter (s. 303).

The grounds of appeal are to be stated (s. 306). Formal objections are to be disallowed, or may be removed by amendment (ss. 307-8), and the decision of the Court is final (s. 310).

The provisions of sec. 31 of the Summary Jurisdiction Act, 1879, which do not apply to the appeals under consideration, deal with procedure on appeals from Courts of summary jurisdiction to Courts of General or Quarter Sessions.

As to the recovery of expenses, see sec. 314.

Offences connected with Asylum Administration.—(1) To receive or detain a lunatic, or alleged lunatic, contrary to the Act is a misdemeanor, and, in the case of detention in an unlicensed house, a penalty not exceeding fifty pounds may also be imposed (s. 315, subs. (1)). As to meaning of "lunatic" for this purpose, see *R.* v. *Bishop*, 1880, 5 Q. B. D. 259:

(2) To receive or detain two or more lunatics in any house, unless the house is an institution for lunatics, or workhouse, contrary to Act (s. 315, subs. (2)): misdemeanor (*ibid.* subs. (3)):

(3) Neglect to send notices on admission: misdemeanor, and in case of a single patient, penalty of fifty pounds may also be imposed (s. 316):

(4) To make wilful misstatement of material fact in any petition, statement of particulars, reception order, medical or other certificate, or statement or report of bodily and mental condition: misdemeanor (s. 317). No prosecution is allowed for this misdemeanor without the order of the Commissioners, or the direction of the Attorney-General or the Director of Public Prosecutions:

(5) To knowingly make any false entry in any book, statement, or return, as to any matter as to which any entry is required: misdemeanor (s. 318):

(6) Omission to send notice to coroner of death of single patient: misdemeanor (s. 319):

(7) Non-compliance with the Act or rules: penalty not exceeding ten pounds for each day or part of a day during which the default continues, unless a penalty is expressly imposed by the Act of 1890, or any other Act, for such default. All or any part of the cumulative penalties may be remitted by the Court in any proper case (s. 320):

(8) To obstruct any Commissioner or Chancery or other visitor in the exercise of his powers: penalty not exceeding fifty pounds for each offence, and misdemeanor (s. 321):

(9) Ill treatment of any patient by any person in charge: misdemeanor, fine or (and) imprisonment; or penalty, not less than two nor more than twenty pounds for each offence (s. 322). As to the kind of custody which comes within the range of this provision, see *Buchanan* v. *Hardy*, 1887, 18 Q. B. D. 486. The evidence of patients is frequently taken in proceedings for ill treatment. As to the conditions under which such evidence is admissible, see Wood Renton on *Lunacy*, pp. 682-684:

(10) Permission by any manager, etc., of escape of patient, or secretion of patient by any such manager: penalty between two pounds and twenty pounds (s. 323):

(11) Abuse of any female lunatic by any person employed in any institution for lunatics: misdemeanor; two years' imprisonment (maximum) with or without hard labour; consent immaterial (s. 324). As to common law on this subject, see *R.* v. *Fletcher*, 1859, Bell's C. C. 63; *R.* v. *Fletcher*, 1866, L. R. 1 C. C. R. 39; *R.* v. *Barratt*, 1874, 43 L. J. M. C. 7.

The Lunacy Act, 1890, contains various provisions for the protection of persons prosecuted or sued for things done or omitted to be done in pursuance of the statute. Thus where the charge is omission to send documents, the burden of proof as to sending rests on the person prosecuted; but if he proves by the testimony of one witness upon oath that the document was properly addressed and put into the post in due time, or left at the proper office, such proof is a bar to all further proceedings in respect of such charge.

Again, persons putting the law in force are not to be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction or on any other ground, if they have acted in good faith and with reasonable care (s. 330, subs. (1)); and civil proceedings may be stayed on summary application to the High Court or a judge, if the Court or judge is satisfied that there is no reason for alleging want of good faith or reasonable care (*ibid.* subs. (2)). As to this latter provision, see *Williams* v. *Beaumont & Duke*, 1894, 10 T. L. R. 489, 543. And see now, as to the protection of persons acting in execution of a statutory or other public duty, Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1.

Criminal Lunatic Asylums.—There was no doubt at common law as to the power of the Courts to order the detention of criminal lunatics in safe custody. But prior to 1800 the practice was varying and uncertain. In that year, however, after the acquittal of Hadfield for the attempted murder of George III. in Drury Lane Theatre (see article LUNACY), a question arose as to the provision which should be made for his detention, and the Criminal Lunatics Act, 1800, 39 & 40 Geo. III. c. 94, part of which is still in force, was passed to affirm the law on the subject. The Act of 1800 provided that in cases of high treason, murder, or felony, persons acquitted on the ground of insanity (s. 1), or found insane upon arraignment (s. 2), may be ordered by the Court to be kept in strict custody till His Majesty's pleasure was known, and such persons were therefore called King's pleasure lunatics. By sec. 4 insane persons by whom the Sovereign's person is endangered may be kept in safe custody by order of the Privy Council or Secretary of State pending further inquiry. The right of detention of such persons rests in the Lord Chancellor, Lord Keeper, or Lords Commissioners for the Custody of the Great Seal.

No provision of a permanent character was, however, made till 1860. There were criminal lunatic wards at Bethlem Hospital, and arrangements were made by the Government for the reception of criminal lunatics at Fisherton House. But nothing further was done till the establishment of Broadmoor Asylum in 1860, in pursuance of the Criminal Lunatic Asylums Act, 1860, 23 & 24 Vict. c. 75. That statute enables His Majesty by warrant to appoint any asylum or place in

England, that may be deemed suitable, to be an asylum for criminal lunatics, (s. 1), and empowers the Home Secretary to appoint a council of supervision, as well as officers, attendants, and servants for any asylum provided under the Act, and to make rules for the government of such asylums (ss. 4 and 5). As yet Broadmoor only has been appointed under this authority, and hence the statute of 1860 is known as the Broadmoor Act.

The Criminal Lunatics Act, 1836, 1 & 2 Vict. c. 14, enables justices to order the apprehension and conveyance to an asylum, and to inquire into the settlement of lunatics or dangerous idiots, and to make outlay for their maintenance. The authority on which the maintenance order is made has a right of appeal to Quarter Sessions. In order to justify apprehension, the circumstances must be such as to denote both a derangement of the mind and a purpose of committing some indictable offence.

The Lunatics Removal (India) Act, 1851, provides for the removal to a criminal lunatic asylum in this country of persons found guilty of crimes and offences in India, and acquitted on the ground of insanity. See *In re Maltby*, 1881, 7 Q. B. D. 18, as to the construction of the statute.

Similar provisions with regard to colonial criminal lunatics are contained in the Colonial Prisoners Removal Act, 1884, 47 & 48 Vict. c. 3. The object of the Act is to authorise the removal from any British possession (including India) to the United Kingdom, or to any other consenting British possession, for the purpose of undergoing the remainder of their sentences, of prisoners who have been tried under the authority of Imperial Acts, or who at the time of committing the offences of which they are convicted are subject to the Army Act or the Navy Discipline Acts, and prisoners not coming under either of the foregoing categories whose health would be permanently injured by imprisonment in the possession where they are undergoing sentence, or whom it is expedient to remove for safer custody or more efficiently carrying out the sentence. The Act also authorises the removal of criminal lunatics from any possession to the United Kingdom or to another possession.

Although it is unlikely that the occasions for the exercise of the powers proposed to be created by the Act will frequently arise, cases have occurred from time to time in which the existence of such powers would have prevented great hardships and even cruelty to Europeans sentenced to long terms of imprisonment in tropical climates.

The policy of this statute has been followed in the New South Wales Lunacy Convention Act, 1894, 58 Vict. (No. 5), and in the Falkland Islands Lunacy Ordinance, 1895 (No. 2), which enables the Governor in Council to send lunatics in gaols in the colony to the United Kingdom. There appears to be no lunatic asylum in the colony. See *Journal of the Society of Comparative Legislation*, 1896, vol. i. pp. 25 and 102.

For the law with reference to the arraignment and trial of persons alleged to be lunatics who are charged with criminal offences, see LUNACY.

Where it appears to any two members of the visiting committee of a prison that a prisoner, *not being under sentence of death*, is insane,

they have him examined by two legally qualified medical practitioners, Criminal Lunatics Act, 1884, s. 2, subs. (3). If the certificate is to the effect that the prisoner is insane, the Home Secretary may by warrant direct his removal to a criminal lunatic asylum (s. 2, subs. (1)).

A similar inquiry may be instituted by the Home Secretary in the case of *a prisoner under sentence of death*, with similar procedure in the event of insanity being certified (*ibid.* subs. (4)).

Where it is certified by two medical practitioners that a criminal lunatic (not being a person with respect to whom a special verdict has been returned that he was guilty of the act or omission charged against him, but was insane at the time (see LUNACY), is sane, the Home Secretary may direct him to be remitted to prison (s. 3).

The Criminal Lunatics Act, 1884, contains provisions similar to those contained in the Lunacy Act, 1890, as to the discharge (conditional or absolute) and transfer of criminal lunatics, and the detention of persons becoming pauper lunatics.

The expenses of maintenance of criminal lunatics are defrayed out of moneys provided by Parliament. Hansard, 3rd ser., vol. ccxc. p. 75; 139 Com. Jo. 336, 340, 344; and sec. 10 of Act of 1884.

In the case of criminal lunatics absolutely or conditionally discharged (see sec. 5, subs. (2)), only such sum or sums as the Commissioners of the Treasury on the recommendation of the Secretary of State think fit, are contributed (sec. 10, subs. (2)). There is power to recover charges from the lunatic's estate (subs. (3)).

Criminal lunatics removed under the Lunatics Removal (India) Act, 1851, are also an exception (subs. (4)).

"Criminal lunatics" means for the purposes of the Act—(*a*) any person for whose safe custody during His Majesty's pleasure His Majesty or the Admiralty is authorised to give order; and (*b*) any prisoner whom a Secretary of State or the Admiralty has in pursuance of any Act of Parliament directed to be removed to an asylum or other place for the reception of insane persons (s. 16).

[See on the whole subject of this article, Pope on *Lunacy;* Archbold's *Lunacy,* 4th ed.; Wood Renton on *Lunacy.*]

Asylums Boards. — 1. *Metropolitan.* — The Metropolitan Asylum Board is the board of management of the metropolitan asylum district constituted in 1867, by order of the Poor Law Board, under the powers of the Metropolitan Poor Act, 1867, 30 & 31 Vict. c. 6.

Sec. 5 of that Act provided for the institution, support, and management of asylums for the reception and relief of the sick, insane, or infirm, or other class or classes of the poor, chargeable in unions and parishes in the metropolis. By the above-mentioned order the unions and parishes enumerated in the schedule annexed thereto, being all wholly, or for the greater part thereof, included within the metropolis as defined by the Metropolitan Management Act, 1855, 18 & 19 Vict. c. 120, were combined into a district, now co-extensive with the administrative county of London, to be termed "The Metropolitan Asylum District," for the reception and relief of the classes of poor persons chargeable to some union or parish in the said district respectively, who may be "infected with or suffering from fever, or the disease of small-pox, or may be insane."

A board of management was constituted for the district, of forty-five

members, to be elected for each union and parish according to the number set against his name in an appended schedule, and of fifteen members to be nominated by the Poor Law Board.

The guardians of each union or parish were to elect the managers from amongst themselves, or ratepayers rated to the poor rates within the district upon a net annual value of not less than £40, and their term of office was to be for three years.

By various orders of the Poor Law Board the parishes have been redistributed amongst the unions, and certain parishes formed into unions, and the number of representatives altered, so that in 1886 the board was formed by fifty-four elected members and eighteen nominated. The nominated members are never to exceed one-third of the elected members. The insane persons admitted into an asylum under the board are such harmless persons of the chronic or incurable class as could be lawfully retained in a workhouse; but no dangerous or curable persons, such as would require to be sent to a lunatic asylum, ought to be admitted.

Sec. 11 of the Metropolitan Poor Amendment Act, 1869, 32 & 33 Vict. c. 63, to amend the above-mentioned Act, enacted that the guardians of any union or parish, the managers of any school "or asylum district," might, with the consent of the Poor Law Board, purchase, hire, or otherwise acquire, and fit up and furnish one or more ships, to be used for the training of boys for the sea-service; and every such ship is deemed a school or asylum.

Under these powers, asylums have been set up in various parts of the district for small-pox, fever, and cases of imbecility; as well as training-ships under the directions of the Poor Law Board, or the Local Government Board, which from 1871 has exercised its powers and duties.

The Asylum Board is a corporation with a common seal, with power to take and hold lands, and other property, for the purposes of the Act, and has the general powers of poor law guardians as regards the asylums, with the like powers of borrowing money for building and necessary purposes connected with their management. The managers are subject to the orders of the Local Government Board in like manner as guardians under the Poor Law Acts. In an asylum for the insane, the Commissioners in Lunacy may depute either one of their own number, or a special Commissioner, to attend meetings, but not to vote. Every asylum is a workhouse within the meaning of the Lunacy Acts. The expenses are defrayed by contributions from the unions and parishes forming the district.

By sec. 16 of the Valuation (Metropolis) Act, 1869, 32 & 33 Vict. c. 67, a duplicate of the certified valuation lists, made by the various assessment committees (see ASSESSMENT COMMITTEE), is directed to be sent to the clerk of the managers of the board. He had the duty of printing and distributing the totals of the gross and rateable value in the lists to every assessment committee, and the overseers of every parish in the metropolis, and many other authorities. These duties are transferred to the clerk of the London County Council by the Local Government Act, 1888, s. 44.

In an action for nuisance against the managers, by landowners adjacent to one of their small-pox hospitals, it was held that the powers conferred by the Act do not authorise the managers to create a nuisance to health or property, there being no direct and peremptory provision to

exercise their powers within defined local limits (*Managers of the Metropolitan Asylum District* v. *Hill*, 1881, 6 App. Cas. 193).

2. *Lancashire Asylums Board.*—An Asylums Board for the County of Lancashire was constituted by the Lancashire County (Lunatic Asylums and other Powers) Act, 1891, 54 Vict. c. xx.), and to its administration were transferred the following four pauper lunatic asylums, namely, the Lancaster Asylum at Lancaster, the Whittingham Asylum near Preston, the Rainhill Asylum near Liverpool, and the Prestwich Asylum near Manchester. The board is constituted of thirty-eight representatives of the county, and of forty-nine representatives of the county boroughs (s. 3).

It is a body corporate, by the name of the Lancashire Asylums Board, with perpetual succession and a common seal, and with power to hold land for the purposes of its constitution without any licence in mortmain, and to dispose of land.

The members are annually elected in November, 38 by the County Council (s. 5, subs. (1)), and the rest by county boroughs (*ibid.* subs. (2)), in the following proportions:—Barrow-in-Furness, 2; Bootle, 2; Bolton, 4; Burnley, 2; Bury, 2; Liverpool, 8; Manchester, 6; Oldham, 4; Preston, 4; Rochdale, 2; Salford, 4; St. Helen's, 2; Stockport, 1; Wigan, 2. Blackburn had formerly four allotted to it, but has withdrawn from the arrangement, in terms of an enabling provision in the Act (s. 37).

Members of the board come into office on their election, and hold office until the next ensuing election, and are re-eligible (s. 5, subs. (4)).

A member of the board is not to be interested, otherwise than as a shareholder in a company, either in his own name or in the name of any other person, in any contract entered into or work done for the board, and is not to derive any profit or emolument whatsoever from the funds of the county lunatic asylums (s. 6).

A member of the board elected by the county council who ceases to be a member of the county council ceases to be a member of the board (s. 7).

Casual vacancies are filled up by the council by whom the vacating member was originally chosen (s. 9).

The rules as to meetings of the board are prescribed in a schedule to the Act (sched. ii.).

At its annual meeting in November in each year the board appoints a visiting committee of not less than eleven members for every asylum, and delegates to each committee such powers and duties as it thinks fit. The following provisions of the Lunacy Act, 1890, apply to each visiting committee:—Vacancies to be filled up (s. 176, Act of 1890); Duration of office (s. 172, *ibid.*); Examination of accounts (s. 173, *ibid.*); Members of visiting committee not to be interested (s. 174, *ibid.*); Meetings of visiting committee (s. 175, *ibid.* except par. 1); Clerk to visiting committee (s. 176, *ibid.*). The visiting committees, in turn, may appoint sub-committees (s. 13, subss. (1) and (2)).

The board may also appoint out of its own body other committees, either of a general or special nature (s. 13, subs. (3)), and has practically the same powers, as regards the appointment of officers, as exist under the general Lunacy Acts.

The board has also practically the same rights and duties with regard to asylum accommodation as local authorities under the Act of 1890. (See ASYLUMS.)

All expenses incurred by the board in the execution of its duties shall be paid out of an "asylums fund," and sums in the nature of revenue are carried to this fund (s. 23, subss. (1) and (2)).

The sums charged for private patients and any excess created under the enactments are dealt with and applied as under the general Lunacy Act, 1890 (*ibid.* subs. (3)).

The amounts to be contributed by the county and the county boroughs respectively are estimated by the board before the 1st of March in each year, and divided between them according to their respective rateable values, with an "added sum" of £4000, or such other amount as may be fixed by agreement or arbitration (ss. 24 and 25). Payment of the respective amounts is enforced by the following machinery:—Before the 1st of March in each year the chairman of the board sends to the county council and to the council of each county borough a precept for payment of the amount due. If the precept is not complied with, two justices issue a warrant, and the treasurer of the board has, in regard to it, the same powers as a guardian or overseer for the recovery of county rates and surcharges (s. 26).

At.—When "at" is used in a will or deed as descriptive of the situation or locality of property, its meaning is synonymous with "in." But in such a phrase as "at or within" the word "at" is rather used in the sense of "near to," or "adjacent to" (*Evans* v. *Angell*, 1858, 26 Beav. 202; 53 E. R. 874; *Homer* v. *Homer*, 1878, 8 Ch. D. 758). A legacy given "at" a particular age or time confers a contingent interest, being equivalent to "if the event shall happen" (*Parker* v. *Hodgson*, 1861, 1 Drew. & Sm. 568; 62 E. R. 495; Williams, *Executors*, 2nd ed., p. 1000). Generally, for the construction of "at" in wills and elsewhere, see Jarman, *Wills;* and Stroud, *Jud. Dict.*

At and from.—These words are those employed in the usual voyage policy of marine insurance, to denote the place or point at which the risk undertaken by the underwriters is to begin, whether the policy be on ship, freight, or cargo for that voyage. See MARINE INSURANCE, *Beginning of Risk.*

Atheism.—See BLASPHEMY; PARENT AND CHILD.

Attaché.—One attached to an embassy or legation to learn diplomatic practice. The term is also loosely used to describe all subordinate secretaries of an embassy or legation.

Attachés are the lowest grade in the diplomatic hierarchy, and from among them secretaries of embassy and legation are usually selected. They enjoy the privileges and immunities granted to all members of embassies and legations (see *Parkinson* v. *Potter*, 1885, 16 Q. B. D. 152; *Macartney* v. *Garbutt*, 1890, 24 Q. B. D. 368). See DIPLOMATIC AGENTS; EXTERRITORIALITY.

Attachment of Debts.—See EXECUTION.

Attachment, Writ of.—See EXECUTION.

Attainder.—This word means primarily the attainment of an end, or, in its application to criminal law, a conviction. It has, how-

ever, been fancifully connected with a taint or stain, and has thus widely departed from its original meaning.

Attainder means neither a conviction nor the results of a conviction, but the results of judgment following on conviction, or judgment of outlawry in cases of treason or capital felony.

These results were forfeiture and corruption of blood.

By attainder in case of treason, lands were forfeited to the Crown; estates of inheritance for ever, interests for life, or for years, during such time as they lasted.

By attainder for a capital felony, lands were forfeited to the Crown for a year and a day, and then escheated to the lord of the fee.

The Statute de Donis mitigated for a while the effect of an attainder: an estate tail was regarded as a series of life-estates, and the attainted tenant only forfeited his life interest. But 26 Hen. VIII. c. 13, assimilated estates tail in this respect to other estates of inheritance.

The Statute 54 Geo. III. c. 145, limited the forfeiture or escheat of real estate to cases of attainder for treason or murder.

Forfeiture of goods which, previous to 33 & 34 Vict. c. 23, ensued upon *conviction*, was not a result of attainder, for attainder followed, not upon conviction, but upon judgment of death or outlawry.

But attainder upon judgment or outlawry no longer exists; 33 & 34 Vict. c. 23, abolishes attainder, corruption of blood, forfeiture and escheat, where these followed upon "confession, verdict, inquest, conviction, or judgment of or for any treason, felony, or *felo de se*." Forfeiture is now consequent only upon outlawry.

The doctrine of corruption of blood had a marked effect upon the descent of peerages. To whatever source we trace the origin of the peerage, this doctrine, apart from any idea of forfeiture, would destroy the succession to the title. The Act of George III., above cited, applied generally to corruption of blood, and so narrowed the effect of attainder, in the case of dignities, to conviction or outlawry for high treason and murder.

Besides judgment of death or outlawry, it is, of course, possible to produce the results of attainder by statute. Political offences were first dealt with by Bill of Attainder in 1459. The Parliament of that year presented, in the form of legislation used at that date, a petition that the Yorkist lords might be attainted of high treason and their estates and dignities declared to be forfeited. At this time legislative procedure was changing from petition addressed to the Crown, followed by an ordinance, to the modern practice of sending bills which have passed both Houses to receive the royal assent. The petition is described as "Lecta audita et matura deliberatione plenius intellecta, de avisamento et assensu Dominorum Spiritualium et Temporalium et Communitatis regni Angliæ" (*Rot. Parl.* v. 346, 350). The king gave his assent, saving his prerogative of pardon, excepting two of the persons whom it was proposed to attaint, and saving from forfeiture estates or other interests acquired from the attainted persons by the Colleges of Kings and Eton. This procedure differs from the appeal in Parliament, made by individuals to the Lords (as in 1387), a practice forbidden by 1 Hen. IV. c. 14, and from the impeachment in which the Commons charged an offender at the bar of the House of Lords. Henceforth Bills of Attainder superseded for nearly two hundred years the process by impeachment, as a mode of dealing with political offenders.

The procedure in the case of a Bill of Attainder, or of a bill of pains and penalties, which do not necessarily carry with them the consequences of attainder, follows the course of an ordinary public bill, except that the parties are allowed to appear and defend themselves in both Houses by counsel. The bishops take full part, whereas in an impeachment they withdraw before judgment is given. Such bills usually begin in the Lords, though, as in the case of the bill of pains and penalties against Bishop Atterbury in 1722, they may begin in the Commons. The parties charged may defend themselves, appear by counsel at the bar of each House, and call witnesses.

A bill for reversing an attainder goes through a curious and exceptional form. It is first signed by the Crown and presented by a Lord to the House of Lords by royal command; there it passes through the ordinary stages, and is transmitted to the Commons, where it is essential that the consent of the Crown should be signified before the first reading of the bill (May, *Parliamentary Practice*, 10th ed., 809).

It would seem, in fact, to be an exercise of the prerogative of mercy in a case where, as verdict and sentence are comprised in an Act of Parliament, the Houses must join with the Crown in their reversal. See Blackstone, 11th ed., vol. ii. 251; iv. 259, 380; May, 10th ed., p. 63.

Attaint.—In civil cases the verdict of a jury could at one time be challenged by writ of attaint, under which a jury of twenty-four was summoned to determine whether the first jury had sworn falsely (Hawk., P. C., bk. i. c. 72, s. 5; bk. ii. c. 22, s. 20). This procedure became discredited in consequence of the assertion of the independence of jurors in *Bushel's Case* (see JURY), 1670, 6 St. Tri. 99, and obsolete when motions for new trials were established. It was abolished by s. 60 of the County Juries Act, 1825 (6 Geo. IV. c. 50), with a saving as to the punishment of jurors who consent to be "embraced" (s. 61). See EMBRACERY.

[The authorities on this subject are collected in Beven, *Negligence*, 2nd ed., 277, note 1; Stephen, *Hist. Crim. Law*, i. 306.]

Attempt.—1. At common law the attempt to commit treason, felony, or indictable misdemeanor, is itself an indictable misdemeanor, punishable by fine or imprisonment, without any specified limit (Stephen, *Dig. Crim. Law*, 6th ed., art. 51; and see ARBITRARY PUNISHMENT). By attempt is meant something more than (1) forming the intention to commit the offence (which is not punishable) (*R.* v. *Eagleton*, 1855, Dears. C. C. 515); or (2) the combining with others for the purpose of committing it, which is conspiracy; or (3) the inciting others to commit it. Some overt act must be done which is more than intention or preparation, and which aims at, but falls short of, the complete offence (*R.* v. *Ransford*, 1874, 13 Cox C. C. 9; *R.* v. *Hensler*, 1870, 11 Cox C. C. 570). It is not necessary that it should have been legally or physically possible for the offender to commit the full offence (*R.* v. *Brown*, 1890, 24 Q. B. D. 357; *R.* v. *Ring*, 1892, 61 L. J. M. C. 116; *R.* v. *Williams*, [1893] 1 Q. B. 320). But on these cases see Pritchard, *Quarter Sessions*, 2nd ed., 900-903.

It has been held that an attempt by letter to incite to the commission of a crime may be committed though the letter is intercepted (*R.* v. *Banks*, 1873, 12 Cox, 393; *R.* v. *Krause*, 1902, 66 J. P. 121).

2. In numerous cases the attempt to commit a crime is specifically punished by statute, either as felony (as in the case of attempts to murder (24 & 25 Vict. c. 100, ss. 11-15); or to choke, with a view to committing an indictable offence (c. 100, s. 21)); or as a misdemeanor punishable in a defined manner. See ABOMINABLE CRIME; ARSON; EXPLOSIVES; MALICIOUS DAMAGE.

3. On an indictment for felony or misdemeanor, the jury may, if the evidence so warrants, find the accused guilty of the attempt (14 & 15 Vict. c. 100, s. 9).

[See also Stephen, *Hist. Crim. Law*, ii. 221-225; Arch. Cr. Pl., 23rd ed., 2, 1295; 1 Russ. on *Crimes*, 6th ed., 195; and, for the fullest consideration, Mayne, *Criminal Law of India*, 1896, 853-863.]

Attendant Terms.—[A term of years which is created for certain purposes becomes, under certain conditions and according to the doctrines of equity, attendant upon the inheritance. The law affecting attendant terms, at one time of the first importance in conveyancing, has since the Satisfied Terms Act, 1845, ceased to have much practical application.] The origin of such terms was as follows. In the reign of Elizabeth, the old form of mortgage, which was a feoffment in fee, subject to a condition of defeasance upon repayment of the mortgage money with interest on a specified day, was superseded in practice by a demise for a long term of years, made either to a mortgagee or to a trustee for him. Long terms were also created for the purpose of securing charges for portions, and for other purposes, in settlements of real estate. On satisfaction of the mortgage or other charge, the term, unless destroyed by a proviso for cesser [see CESSER, PROVISO FOR], subsisted as a valid legal estate, sufficient to maintain or defend an action of ejectment at law. In equity, the person in whom it was vested was regarded as a constructive trustee for all persons interested in the fee out of which the term was derived—that is, the reversion upon the term—according to their respective estates or interests, whether as owners or incumbrancers, and in accordance with the priorities subsisting between them [and a person entitled to the absolute interest, subject to the term, was not regarded as being entitled to two distinct estates, but as a freeholder in actual possession (Williams on *Settlements*). The term in such a case] was said to be attendant upon the inheritance by construction of law. Upon a sale of the [inheritance] to a purchaser for valuable consideration, the term was by the common practice assigned to a trustee, upon trust for the purchaser and to attend the inheritance. The term was then said to be attendant upon the inheritance by express declaration. A purchaser for value who had obtained such an assignment might in equity protect himself, by means of the term, against all dealings with the [inheritance], having an origin later than the creation of the term, whether by way of conveyance, settlement or incumbrance, of which he had no notice at the time of his purchase. Against claims to dower, the term, if attendant by express declaration, was a protection, even with notice. For detailed information upon this subject, and upon the general practice relating to the assignment of attendant terms, see *Co. Lit.* 290*b*, note (1), by Butler, s. xv.; *Second Report of the Real Property Commissioners*, pp. 8-14; *Bythewood's Precedents*, by Parker and Stewart, vol. vii. p. 50; *Jarman and Bythewood*, by Sweet, vol. ix. p. 108; Davidson, *Conc. Prec.*, 15th ed., p. 20.

Successive mortgages, or successive settlements, frequently gave rise to a succession of attendant terms; and it frequently happened in practice that the abstract of the title to the inheritance was accompanied by abstracts of the titles to several attendant terms, much exceeding in bulk the title to the inheritance. Since the chief object of attendant terms was to enable an action of ejectment to be maintained at law, the deduction of the title thereto was peculiarly strict. Moreover, where some only of several executors had proved a will, the title to a term of years could not, before 20 & 21 Vict. c. 77, s. 79, be deduced through the last survivor, unless he had also survived the executors who had refused probate. By reason of these circumstances, attendant terms were the cause of great delay and expense.

The Satisfied Terms Act, 1845, 8 & 9 Vict. c. 112, in effect enacted (s. 1) that every satisfied term which, either by express declaration or by construction of law, should, on the 31st December 1845, be attendant upon the inheritance or reversion of any lands, should absolutely cease and determine, except that such [terms as were attendant by express declaration] should afford to every person the same protection as it would have afforded if they had continued to subsist, but had not been assigned or dealt with after the said date; and (s. 2) that every term becoming satisfied after the said date which, either by express declaration or by construction of law, should after that day become attendant as aforesaid, should thereupon immediately cease and determine.

[A term only becomes "satisfied" if the beneficial interest in the whole charge secured by it and the beneficial interest in the whole estate become merged in one person, and if there is no useful purpose remaining beneficial to the owner of the term (*Anderson* v. *Pignet*, 1872, L. R. 8 Ch. 180). Whether under sec. 1 a person is entitled to the protection of the term depends upon whether equity would restrain his setting it up (*Cottrell* v. *Hughes*, 1854, 15 C. B. 532). For example, it was] held, in *Shaw* v. *Johnson*, 1861, 1 Drew. & Sm. 412; 62 E. R. 437, by Kindersley, V.-C., that a term which had been assigned to attend the inheritance would be revived upon a mortgage being made by the owner of the inheritance, if the transaction included an agreement that the term should be assigned to a trustee for the mortgagee. And in *Anderson* v. *Pignet*, *ubi supra*, it was held that a term vested in a trustee for a mortgagee, who released the mortgage debt on obtaining a conveyance of the equity of redemption, was not a satisfied term within the meaning of the Act. There may be some difficulty in reconciling these cases with *Doe* v. *Price*, 1847, 16 Mee. & W. 603; 73 R. R. 655; *Doe* v. *Moulsdale*, *ibid.* 689; 73 R. R. 693.

[The Satisfied Terms Act does not apply to copyholds, customary freeholds or leaseholds (Dart, V. & P., 7th ed., p. 534).] [See SATISFIED TERMS.]

Attestation.—1. *Of Wills.*—In the case of all wills of personalty made before 1st January 1838, no signature or attestation was necessary, but the Statute of Frauds, 1677, s. 5, required that all devises of lands should be in writing, signed by the devisor or by some other person in his presence, and by his express directions, and should be attested and subscribed in the presence of the devisor by three or four credible witnesses, or else they should be utterly void and of none effect. It was not necessary that the attesting witnesses should be present at the time

of the signature of the will, but each witness was bound to see the testator acknowledge his signature, and subscribe his name in the presence of the testator (*Stonehouse* v. *Evelyn*, 1734, 3 P. Wms. 253; 24 E. R. 1051). The Statute of Frauds did not apply to wills of copyholds and leaseholds. No legatee was considered a credible witness, but the law on this point was altered by the statute of 25 Geo. II. c. 6, which declared, *inter alia*, that an attestation by a legatee should be good, but his legacy void. Although no attestation of a will of personal property was then necessary, Sir William Grant, in *Lees* v. *Summersgill*, 1808, 17 Ves. 508; 34 E. R. 196, held that this statute extended to all wills, but his decision was over-ruled in *Emmanuel* v. *Constable*, 1827, 3 Russ. 438; 38 E. R. 640, and it was decided that a legacy to an attesting witness of a will of personal estate only was not void.

Sec. 9 of the Wills Act, 1837, in which Act will is defined so as to include codicil, provides that every will shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and that such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and subscribe the will in the presence of the testator, but that no form of attestation shall be necessary.

The Wills Act Amendment Act, 1852, explains at great length the meaning of the words "at the foot or end" thereof.

The Wills Act, 1837, also provides that a will shall not be void by reason of the incompetency of an attesting witness; that a gift to an attesting witness or to his or her husband or wife shall be void; but the evidence of the witness shall be admissible to prove the execution of the will; that where, by a will, land is charged with the payment of debts, a creditor, or the husband or wife of a creditor whose debt is so charged, shall be a competent witness to prove the execution of the will; and that an executor is a competent attesting witness of a will.

[Where there was an absolute gift to the wife of an attesting witness, with an alternative contingent gift to her children in the event of her being dead at the period of distribution, then if the wife is alive at that period there is an absolute intestacy as to her share (*Aplin* v. *Stone*, [1904] 1 Ch. 543). A gift to an attesting witness may be rendered effectual if the will is republished by a codicil referring to the will, but not attested by the legatee. The witness may attest subsequent codicils without losing this benefit (*In re Trotter*, [1899] 1 Ch. 764).]

A legacy or residue bequeathed by will is not rendered void by the fact of a codicil to the will being attested by the legatee, where the codicil gives him nothing (*Gurney* v. *Gurney*, 1885, 3 Drew. 208; 61 E. R. 882); nor does subsequent marriage of an attesting witness affect a benefit given by will to the husband or wife of the attesting witness (*Thorpe* v. *Bestwick*, 1881, 6 Q. B. D. 311). But it has been held that, where a solicitor attests a will, he cannot charge profit costs in respect of work done in relation to the estate (*In re Pooley*, 1889, 40 Ch. D. 1).

[An attesting witness who is a beneficiary under a secret trust is not thereby incapacitated from taking under the trust (*O'Brien* v. *Condon*, [1905] Ir. R. 51, not following *In re Fleetwood*, 1880, 15 Ch. D. 594).]

Any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate as he might have

done before the making of the Wills Act, 1839; but the wills of seamen and marines of the Royal Navy and marines must be made in accordance with the provisions of the Navy and Marine (Wills) Act, 1865.

Although no form of attestation is necessary, a memorandum of attestation, stating that the signature was made or acknowledged by the testator in the presence of the witnesses, both being present at the same time, and that they subscribed their names in his presence, is desirable, as it affords a presumption of due execution. In the absence of such a memorandum, the Court will require proof that the provisions of the Wills Act in this respect have been complied with. If there is an attestation clause, it is not essential that it should occur at the end of the will (*In bonis Chamney*, 1849, 1 Rob. Eccl. 757).

Sec. 10 of the Wills Act, 1837, provides that an appointment by will may be validly executed in manner provided by sec. 9 of the same Act, although other forms of execution or solemnity are required by the instrument creating the power.

2. *Of Bills of Sale.* (See Forms, *infra.*)
3. *Of Deeds.* (See Forms, *infra.*)
4. *Of Warrant of Attorney.* See WARRANT OF ATTORNEY.

FORMS.

A.—WILLS.

1. *Short Form.*

SIGNED by the said [*testator*], [*with his mark*], in the joint presence of us, who, in his presence, and in the presence of each other, have hereunto set our hands as witnesses.

2. *Short Form, signed by an Amanuensis.*[1]

SIGNED by [*amanuensis*], as the will of the said [*testator*], in his presence and by his direction, in the joint presence of us, &c. (as above).

3. *Ordinary Form.*

SIGNED by the said [*testator*] as his last will, in the presence of us, present at the same time, who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses.

4. *Ordinary Form, signed by an Amanuensis.*[1]

SIGNED by [*amanuensis*] as the last will of the said [*testator*], in his presence and by his direction, in the presence of us, present at the same time, who at the request of the said [*testator*], in his presence and in the presence of each other, have subscribed our names as witnesses.

[1] The amanuensis should sign the testator's name, though his own signature has been held sufficient; he may be a witness.

5. *Attestation of Will containing Alterations.*

To No. 4 *add :*—The said testator having, before signing the same, caused the words "[*interlined words*]" to be inserted between the fourth and fifth lines of the third page; and the words "[*erased words*]" to be erased from the ninth and tenth lines of the same page; and the words "[*substituted words*]" to be interlined in lieu thereof.

B.—Bills of Sale.

1. *Statutory Form of Attestation* (Sch. Bills of Sale Act, 1882).

In Witness, &c.
Signed and sealed by the said A. B. in the presence of me, E. F. [*add witness's name, address, and description*].

[Note.—Witness's address and description must appear on the bill of sale itself; it is not sufficient to put them on an attached affidavit. The address is sufficiently indicated if it designate the place at which the witness is employed, or is usually to be found during business hours. See article Bill of Sale.]

2. *Attestation Clause to Bill of Sale under the Act of* 1878 *by a Solicitor of the Supreme Court.*

Signed [*or* signed, sealed, and delivered] by the above-named in my presence, the effect of the above-written bill of sale having been explained by me to the said before the execution thereof.

A Solicitor of the Supreme Court of Judicature.

C.—Deeds.

1. *Attestation of a Deed or Instrument under Seal* (*Common Form*).

Signed, sealed, and delivered by the within-named [*or* above-named] A. B., in the presence of C. D., of &c. [*add address and description*].

2. *Attestation of the Execution of a Deed by a Company or Corporation having a Common Seal.*

The seal of the within-named company was affixed in the presence of
A. B., of &c. }
C. D., of &c. } *Directors.*
E. F., of &c., *Secretary.*

3. *Attestation of the Execution of a Deed in which there are Interlineations, Erasures, or Obliterations.*

Signed, sealed, and delivered by the within-named A. B., the words "[*words interlined*]" having been previously interlined [*or* written over

obliterations], between [*or* obliterated in] the fourth and fifth lines of the first skin of the within-written indenture [*or* the word "*Henry*," having been previously interlined between the words "*Thomas Johnson*"] and the name written [on an erasure in the tenth line of the second skin thereof] in the presence of, &c.

4. *Attestation of the Execution of a Deed by another Party, where Interlineations, &c., have been noticed in a previous Attestation.*

SIGNED, sealed, and delivered by the within-named C. D. (the interlineation and erasure noticed in the attestation of the execution by A. B., indorsed hereon, having been previously made), in the presence of, &c.

5. *Attestation of the Execution of a Deed by a Blind Person.*

THE within-written indenture was signed, sealed, and delivered by the within-named A. B., and he being blind, the same indenture was first carefully read over to him in the presence of us [*witnesses*].

6. *Attestation of the Execution of a Deed by a Person Deaf and Dumb.*

THE within-written indenture was signed, sealed, and delivered by the within-named A. B., who, being deaf and dumb, but capable of reading, the same indenture was first read over by him, and he seemed perfectly to understand (*or if the witnesses can so attest*, perfectly understood) the same, in the presence of us [*witnesses*].

7. *Attestation of the Execution of a Deed by an Illiterate Person.*

THE within-written indenture was sealed and delivered by the within-named A. B., who made his mark thereto, the same being previously read over to him in the presence of us [*witnesses*].

8. *Attestation of a Deed executed under a Power of Attorney.*

SIGNED, sealed, and delivered by the within-named [*attorney*], as the attorney of the within-named [*principal*], in the presence of us [*witnesses*].

9. *Attestation of a Deed executed by one of the Parties in his own Right, and as the Attorney of another of them.*

THIS WRITING was signed, sealed, and delivered by the above-named A. B. with his own name, and as his own act and deed ; and afterwards, as the attorney, and with the name, and as the act and deed, of the above-named C. D., by virtue of a letter of attorney given to him, the said A. B., for that purpose, and dated, &c., in the presence of us [*witnesses*].

10. *Attestation of an Instrument intended to operate as an Escrow.*[1]

SIGNED, sealed, and delivered by the within-named [*party*] as an escrow, and placed in the hands of A. B., to be delivered up to the within-named [*other party*] as the deed of the said [*party*], when the sum of £ , the within-mentioned consideration-money, shall have been paid by the within-named [*other party*] to the said A. B. as the agent and on the behalf of the said [*party*].

11. *Attestation of an Instrument not under Seal* (*Common Form*).

SIGNED by the above-named A. B. in the presence of C. D., of &c. [*add address and description*].

[1] It is sometimes convenient to execute an instrument as an escrow, or, in other words, to postpone its operation until some future event or contingency. The proper form of such an execution, according to Sheppard's *Touchstone*, 58, is as follows:—

"I deliver this to you as an escrow to deliver to the party as my deed, upon condition that he do deliver to you £ for me, or upon condition that he deliver up the old bond he hath of mine for the same money (or as the case is);" *or*, "I deliver this to you as an escrow to keep until such a day, upon condition that if, before that day, he to whom the escrow is made shall pay to me £ , [*or*, give me a horse, *or*, enfeoff me of the manor of Dale, *or perform any other condition*] then you shall deliver the escrow to him as my deed."

But an adherence to this precise form is not essential in order to the delivery as an escrow (see Bythewood and Jarman, vol. ii. p. 262 (*n.*)).

Attorney.—A person appointed to act for another. The term was chiefly employed to denote either a private attorney, *i.e.* a person acting under a power of attorney as agent on behalf of another (see POWER OF ATTORNEY), or an attorney at law who was a properly qualified law agent practising in the superior Courts of common law. In the latter sense the term is not now used, as by sec. 87 of the Judicature Act, 1873, it is provided that "all persons admitted as solicitors, attorneys, or proctors of, or by law empowered to practise in, any Court, the jurisdiction of which is hereby transferred to the High Court of Justice, or the Court of Appeal, shall be called Solicitors of the Supreme Court;" and the section proceeds to provide that persons subsequently admitted are to be entitled to the same name. See SOLICITOR.

Attorney, Power of.—See POWER OF ATTORNEY.

Attorney-General.—The Attorney-General is the chief law officer of the Crown, and a great officer of State, appointed by letters-patent, and he is *ex officio* head of the Bar (*q.v.*) for the time being. The history of the office is somewhat obscure, but it would appear to have been established about 1277, when an Attornatus-Regis—as the Attorney-General was originally styled—was appointed to protect the interests of the Crown, in cases affecting it, before the Courts. The appointment was formerly made "quamdiu se bene gesserit," but is now "durante bene placito."

The English law officers, unlike the Lord Advocate and the Irish law officers, are not privy councillors (see Anson, *Law and Custom of the Constitution*, 2nd ed., pt. ii., p. 201 (*n.*)).

The Attorney-General superintends all proceedings at law or in equity affecting the royal prerogative, and is also the chief legal adviser of the various departments of Government. In the House of Commons he is not a member of the Cabinet, but, as a member of the Government, takes the principal charge of legal measures and affairs.

He prosecutes for the Crown in criminal matters and in revenue cases, and grants fiats for writs of error. There are many legal proceedings which by statute cannot be initiated without his sanction, *e.g.* proceedings by any local authority to prevent the pollution of streams (Public Health Act, 1875, s. 69); prosecutions for an offence under the Public Bodies Corrupt Practices Act, 52 & 53 Vict. c. 69; and as to the recovery of penalties, see Public Health Act, 1875, s. 253; Public Health (Officers) Act, 1884, s. 2; Public Bodies Corrupt Practices Act, 1889, s. 4 (1).

The Attorney-General, or, during the vacancy of the office of Attorney-General, the Solicitor-General (*q.v.*), may, in the exercise of his discretion, file an information for any misdemeanor whatsoever. In cases of libel, this procedure is confined to libels of so dangerous a nature as to require immediate action on the part of the law officers of the Crown. There is said to have been no *ex officio* information filed since 1887 (Blake Odgers, *Libel and Slander*, 4th ed., p. 433).

The Attorney-General, as representative of the Crown in matters of criminal judicature, has power to enter a *nolle prosequi* (*q.v.*), and thereby to stay proceedings in any indictment or criminal proceeding, and he may do so *ex mero motu* without calling upon the prosecutor to show cause why that should not be done (*R.* v. *Allen*, 1862, 1 B. & S. 850).

Writs of Certiorari are granted to remove any conviction order or summary proceeding, on the motion or part of the Attorney-General acting officially as a matter of right, whether on behalf of the prosecution or defence, without any affidavit, and without service of any notice on the justices, as required in other cases. See Short and Mellor, *Practice of the Crown Office;* and see CERTIORARI.

The Attorney-General attends in peerage cases, as assistant to the Lords' Committees for Privileges.

In the matter of granting patents, the Crown exercises its discretion through the medium of the law officers and the Comptroller-General of the Patent Office, and the fiat of the Attorney-General is in most cases necessary to a petition for the revocation of a patent. See PATENTS.

In lunacy, the Attorney-General may, under certain circumstances, bring an action on behalf of an insane person. See LUNACY.

The Courts exercise over the Attorney-General the same authority which they exercise over every other suitor; and, accordingly, he would not be permitted to prosecute any proceeding which was merely vexatious and had no legal object (*R.* v. *Prosser*, 1848, 11 Beav. 306; 50 E. R. 834).

The Attorney-General is the only legal representative of the Crown in the Courts (*R.* v. *Austen*, 1821, 9 Price, 142).

But during the vacancy of the office the whole business and authority of the Attorney-General devolve upon the Solicitor-General (*R.* v. *Wilkes*, 1770, 4 Burr. 2527, 2554, 2570).

The Attorney-General is an officer of the Crown, and in that sense only the officer of the public (*A.-G.* v. *Brown*, 1818, 1 Swans. 294; 36 E. R. 396).

He may properly take proceedings on behalf of the public when acts tending to the injury of the public are being done without lawful authority, even though no evidence be produced of actual injury having been inflicted (*A.-G.* v. *Shrewsbury* (*Kingsland*) *Bridge Co.*, 1882, 21 Ch. D. 752; *Ware* v. *Regent's Canal Co.*, 1858, 3 De G. & J. 212; 44 E. R. 1250; *A.-G.* v. *Cockermouth Local Board*, 1874, L. R. 18 Eq. 172; *A.-G.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101; *Devonport Corporation* v. *Tozer*, [1903] 1 Ch. 759; *London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76; *A.-G.* v. *Wimbledon House Estate Co.*, [1904] 2 Ch. 34; and see *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch. 109; [1903] 2 Ch. 556).

Delay or *laches* (see ACQUIESCENCE) may not be imputed to the Attorney-General, suing on behalf of the public, where it might be against an individual in a similar case (*A.-G.* v. *Bradford Canal Co.*, 1866, 15 L. T. 9).

Precedence.—After the 14th December 1864, the Attorney- and Solicitor-General took precedence before all the serjeants (see SERJEANT-AT-LAW); formerly they were accustomed to have place and audience next after the two most ancient of the serjeants, but before the others.

The Attorney-General, by an order of the House of Lords, has pre-eminence over the Lord Advocate (1834, 2 Cl. & Fin. 482; 6 E. R. 1236; 37 R. R. 183).

Remuneration of and Right to Engage in Private Practice.—Formerly, the law officers were entitled to accept private practice without restriction, but important, although tentative, modifications of this privilege were introduced by regulations embodied in Treasury Minutes of 5th December 1892 and 29th June 1894. These regulations, however, were cancelled by a Treasury Minute of 5th July 1895, which prescribes that for the future the Attorney-General and Solicitor-General—who are to receive salaries of £7000 and £6000 per annum respectively—shall not undertake business of any kind on behalf of private clients, and any law officer shall, on appointment to office, return any papers or briefs on behalf of private clients. Provision, however, is made for payment of fees, according to the ordinary professional scales, to the law officers in respect of such contentious business as relates to proceedings, civil or criminal, which have actually been commenced, and in which the Government represents the plaintiff, defendant, or prosecutor.

In all cases of contentious business, save certain ones specified, a law officer shall not be instructed unless, in the opinion of the Attorney-General for the time being, it is necessary in the interest of the public service that a law officer should appear.

Right of Reply.—The Attorney-General and the Solicitor-General, prosecuting in person, have a right of reply in all cases, whether evidence is or is not called for the defence. Other counsel, even although representing the Crown, have no such right if the prisoner calls no witnesses. See REPLY, RIGHT OF.

The Attorney-General of the Queen Consort.—The Queen Consort is, in law, a public person exempt and distinct from the king. She may sue and be sued without the King being joined; but she has an Attorney-

General, in whose name she sues and is sued. This privilege does not extend to a Queen Dowager.

The Attorney-General to the Prince of Wales.—The Prince of Wales, as Duke of Cornwall, has an Attorney-General, in whose name he may sue and be sued for matters relating to that duchy (*A.-G. to the Prince of Wales* v. *Sir T. St. Aubyn*, 1811, Wight. 167, 246, 255, 256; 12 R. R. 718*n.*; *A.-G. of the Prince of Wales* v. *Lambe*, 1848, 11 Beav. 213; 50 E. R. 798; *A.-G. of the Prince of Wales* v. *Crossman*, 1866, L. R. 1 Ex. 381).

The Attorney-General of the County Palatine of Lancaster.—There is an Attorney-General of the County Palatine Court.

See LANCASTER, DUCHY AND COUNTY PALATINE OF; and Daniell, *Chancery Practice*, 7th ed., vol. i. p. 58.

In almost all the Crown colonies there is an Attorney-General, who is appointed from home by warrant under the signet and sign manual, and whose duties are in the main similar to those of the same officer in England. [In Mauritius the first law officer of the Crown is styled Procureur and Advocate-General; he is also Ministère Public. In Cyprus the title of "King's" Advocate is still retained.] In self-governing colonies the Attorney-General is appointed by the Administration of the colony.

See Clark, *Colonial Law*.

Attornment.—The term attornment, in the strict sense which prevailed in the old law of real property, signified "the agreement of the tenant to the grant of the seigniory, *i.e.* to become tenant to a new lord of the seigniory; or of a rent; or the agreement of the donee in tail, or tenant for life, or years, to a grant of a reversion or of a remainder made to another, *i.e.* to become connected with him in the relation of landlord and tenant of the tenement" (Sheppard's *Touchstone*, by Preston, ii. 253). Modern legislation has rendered obsolete most of the old learning on the subject, though it is still customary to insert an attornment clause in mortgage deeds; and the word is now often used in the sense of an acknowledgment or admission of the existence of a tenancy, without special reference to a transfer of the title to the reversion. This is chiefly important in relation to the doctrine of estoppel. The word attornment is also used in an analogous sense in connection with the law of BAILMENTS (*q.v.*).

Attornment by the Tenant of Land.—The strict sense of the word attornment was closely related to the idea of feudal possession. "At common law, reversions and remainders, lying in grant and not being capable of being perfected by livery, as in the case of the grant of a freehold, or by entry in the case of the grant of a leasehold interest, required, for many purposes, an attornment of the tenant of the particular preceding estate; but when such attornment was obtained, the reversion or remainder, or the estate carved out of it, vested so as to give the grantee the right to the rents and services attached to the reversion, and, since 32 Hen. VIII. c. 34, to sue on any covenant running with the reversion" (*per curiam*, *Doe* v. *Brown*, 1853, 2 El. & Bl. 331). An attornment was not necessary where the reversion was transmitted by descent or devise (*Doe* v. *Smith*, 1838, 8 Ad. & E. 255); but in cases of transfer or grant it was necessary that the tenant in possession should attorn in order to complete the title of the grantee. The attornment,

when made, related back to the date of the grant; but by sec. 9 of the statute 4 Anne, c. 16, it was provided that "all grants or conveyances, by fine or otherwise, of any manors or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual, to all intents and purposes, without any attornment of the tenants of any such manors, or of the land out of which such rent shall be issuing, or of the particular tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made." The grant of a reversion is now, therefore, good as from its date without any attornment; the tenant at once becoming tenant of the new landlord upon the terms of his existing lease (*Brydges* v. *Lewis*, 1842, 3 Q. B. 603). The 10th section of the Act protects the interest of the tenant by providing that he is not to be prejudiced by payment of rent to the grantor before notice of the grant. The statute does not apply to a lessee who has assigned away all his estate and interest before the lessor assigns the reversion; the assignee of the reversion cannot sue him for rent without an attornment (*Allcock* v. *Moorhouse*, 1882, 9 Q. B. D. 366). The grant of a term of years out of a remainder or reversion is a "grant of a reversion" within the meaning of the statute (*Doe* v. *Brown*, 1853, 2 El. & Bl. 331), though in one case Page Wood, V.-C., seems to have held the contrary (*Edwards* v. *Wickwar*, 1866, L. R. 1 Eq. 403).

Under the old law, an attornment to a stranger by the tenant in possession was equivalent to a dispossession of the reversioner who had been "in possession by means of his tenant." This effect of an attornment was abolished by sec. 11 of the Statute 11 Geo. II. c. 19, except in the case of an attornment "made pursuant to, and in consequence of, some judgment at law, or decree or order of a Court of equity, or made with the privity and consent of the landlord or landlords, lessor or lessors, or to any mortgagee after the mortgage is become forfeited."

Though attornment is now unnecessary, it is sometimes advisable for an assignee of the reversion to procure an attornment from the tenant. In the first place, this is an act of ownership, which is admissible in evidence to prove his title as against future occupiers, whether claiming under the tenant or not (*Doe* v. *Edwards*, 1836, 5 Ad. & E. 95). And, as against the tenant himself, in an action for rent or for use and occupation, proof of an attornment by the defendant to the plaintiff is strong *primâ facie* evidence that the relation of landlord and tenant existed between them (*Gravenor* v. *Woodhouse*, 1822, 1 Bing. 38; 25 R. R. 587), and operates as an estoppel, unless the defendant can show that it was obtained by fraud or misrepresentation (*Doe* v. *Brown*, 1837, 7 Ad. & E. 447), or that he has attorned by mistake to a person who had no title (Bayley, J., *Cornish* v. *Searell*, 1828, 8 Barn. & Cress. 471; 32 R. R. 445; see *Carlton* v. *Bowcock*, 1884, 51 L. T. 659). A person who, on the execution of an agreement for a demise to him, procures attornments from the occupiers of the land, is in the same position as if he had occupied himself, and is accordingly liable for use and occupation (*Neal* v. *Swind*, 1832, 2 Cromp. & J. 377). An attornment to a third party by a tenant from year to year is a disclaimer or renunciation of his character as tenant, the effect of which is that the landlord may determine the tenancy without notice (*Doe* v. *Evans*, 1841, 9 Mee. & W. 48).

If a receiver has been appointed by the Court, and the tenants

attorn and pay rent to him, a tenancy by estoppel is created which enables the receiver to distrain for rent in his own name (*Dancer* v. *Hastings*, 1826, 4 Bing. 2; 12 Mo. 34); but the attornment does not enure for the benefit of the person who has the legal estate so as to entitle him to distrain (*Evans* v. *Matthias*, 1857, 7 El. & Bl. 590). Where a receiver is appointed by the County Court under the provisions of the Tithe Act, 1891, the occupiers of the lands are required to attorn tenants to him. If any occupier refuses, and it becomes necessary to enforce payment of rent in arrear, the receiver is required to apply to the Court for an order authorising him to distrain in the name of the owner (Tithe Act, 1891, rr. 18 and 20).

An attornment may be made by using any words, written or spoken, that import an assent or agreement to become tenant, or by the payment of rent, or of a nominal sum in the name of attornment (see Sheppard's *Touchstone*, by Preston, ii. 261).

A mere attornment, whereby a tenant puts one person in the place of another as his landlord, continuing to hold on the same terms as before, does not require a stamp (*Doe* v. *Edwards*, 1836, 5 Ad. & E. 95). But a stamp is necessary when a document, purporting to be an attornment or acknowledgment, is really intended to operate as a contract, or to be evidence of a contract (*Doe* v. *Frankis*, 1840, 11 Ad. & E. 792). Thus, an agreement whereby one person agreed to attorn and become tenant to another of certain lands, "to hold the same for such time and on such conditions as might be subsequently agreed on," was held to require a stamp as an agreement for a new tenancy (*Cornish* v. *Searell*, 1828, 8 Barn. & Cress. 471; 32 R. R. 445).

The subject of attornment is of special importance in the case of lands in mortgage. Formerly, a lease made by a mortgagor in possession, after the mortgage and without the authority of the mortgagee, did not create any tenancy as against the mortgagee (*Keech* v. *Hall*, 1778, 1 Doug. 21; *Moss* v. *Gallimore*, 1779, 1 Doug. 279), and the mortgagee could not recover rent from the lessee either by action or by distress (*Rogers* v. *Humphreys*, 1835, 4 Ad. & E. 299; 43 R. R. 340). But if the lessee attorned to the mortgagee, a new tenancy was created, which was presumptively a tenancy from year to year (*Doe* v. *Bucknell*, 1838, 8 Car. & P. 566; *Doe* v. *Ongley*, 1850, 10 C. B. 25). The same result followed if the mortgagee claimed and received rent from the lessee without setting up the lease, though evidence might be given to show that the mortgagee had authorised the mortgagor to grant the lease, or that he claimed the rent, and that the lessee paid it, on the basis of the lease (*Corbett* v. *Plowden*, 1884, 25 Ch. D. 678). The same principles seem to have applied to the rarer case of a lease made by a mortgagee in possession before foreclosure, unless the lease was made "to avoid an apparent loss, and merely in necessity" (Lord Macclesfield, L.C., *Hungerford* v. *Clay*, 1722, 9 Mod. Ca. 1). Sec. 18 of the Conveyancing Act, 1881, confers powers of leasing both on mortgagors in possession and on mortgagees in possession, "unless a contrary intention is expressed in the mortgage deed, or otherwise in writing." But attornment is still necessary in the case of leases to which the statutory powers do not apply.

A mere notice by the mortgagee to the lessee, requiring him to pay rent, does not make the lessee a tenant of the mortgagee (*Evans* v. *Elliot*, 1838, 9 Ad. & E. 342; 48 R. R. 520; *Hickman* v. *Machin*, 1859, 4 H. &

N. 716); nor does the mere fact that the lessee remains in possession after such notice, constitute any evidence from which a tenancy to the mortgagee can be inferred against the lessee (*Towerson* v. *Jackson*, [1891] 2 Q. B. 484). But an attornment by the lessee after notice of the mortgage, or the payment of rent to the mortgagee under threat of eviction, creates a tenancy between them. On the other hand, it is equivalent to an eviction by title paramount, and may therefore be set up by the lessee, if the mortgagor sues or distrains for rent accrued due after such notice and attornment (*Mayor of Poole* v. *Whitt*, 1846, 15 Mee. & W. 571; 71 R. R. 765). As to rent due and unpaid before the notice, payment to the mortgagee under constraint is equivalent to payment to the mortgagor (*Johnson* v. *Jones*, 1839, 9 Ad. & E. 809; 48 R. R. 714; *Underhay* v. *Read*, 1887, 20 Q. B. D. 209).

Attornment by Mortgagor to Mortgagee.—It is common to insert in mortgage deeds an attornment clause whereby the mortgagor attorns tenant to the mortgagee. The object of this clause is to give the mortgagee a power of distress as an additional security for payment of the mortgage debt and interest.

An attornment clause creates a real tenancy, even if the mortgagee has not the legal estate (*Morton* v. *Woods*, 1869, L. R. 4 Q. B. 293). Thus, a mortgagor may attorn to a receiver appointed by the parties (*Jolly* v. *Arbuthnot*, 1859, 28 L. J. Ch. 547; 4 De G. & J. 224; 45 E. R. 87), or to a second mortgagee, even if he has already attorned tenant to the first mortgagee (*Ex parte Punnett, re Kitchin*, 1880, 16 Ch. D. 226). A tenancy from year to year, or from month to month, created by an attornment clause, is not cut down to a tenancy at will by a proviso enabling the mortgagee to determine the tenancy for the purpose of taking possession (*Ex parte Queen's Benefit Building Society, re Threlfall*, 1880, 16 Ch. D. 274; *Ex parte Voisey, re Knight*, 1882, 21 Ch. D. 442). A tenancy at will is determined at the death of the mortgagor, and the mere payment of interest on the mortgage by his heir-at-law is not evidence of a new tenancy between him and the mortgagee (*Turner* v. *Barnes*, 1862, 31 L. J. Q. B. 170; *Scobie* v. *Collins*, [1895] 1 Q. B. 375).

Whether the attornment clause is followed by an express power of distress or not, the mortgagee is justified (apart from the provisions of the Bills of Sale Acts, *infra*) in distraining on the goods either of the mortgagor himself (*West* v. *Fritch*, 1848, 18 L. J. Ex. 50) or of strangers (*Pinhorn* v. *Sonster*, 1853, 22 L. J. Ex. 266; *Jolly* v. *Arbuthnot, supra*; *Kearsley* v. *Philips*, 1883, 11 Q. B. D. 621). In this respect, a distinction exists between an attornment clause which creates a tenancy and a mere conventional power of distress, which is good by way of contract or licence against the mortgagor himself, but does not justify seizure of the goods of a stranger (*Freeman* v. *Edwards*, 1848, 17 L. J. Ex. 258; *Kearsley* v. *Philips, supra*). The proceeds of a distress levied under an attornment clause are, in the absence of any provision to the contrary, applicable to the payment of principal as well as interest (*per* James, L.J., *In re Stockton Iron Furnace Co.*, 1879, 10 Ch. D. 335); and the fact that the rent reserved is equal to the interest, and is made payable on the same days, is not sufficient to displace the *primâ facie* right (*Ex parte Harrison, re Betts*, 1881, 18 Ch. D. 127). The fact that the mortgagee is made a landlord under the attornment clause does not cut down his rights as mortgagee in respect of trade fixtures annexed to the

premises after the date of the mortgage (*In re Stockton Iron Furnace Co., supra; Ex parte Punnett, re Kitchin, supra*).

It was held by Bacon, V.-C., that an attornment clause does not make the mortgagee a mortgagee in possession as against subsequent incumbrancers, so as to be liable to them for rent which he might have received but for his wilful default (*Stanley* v. *Grundy*, 1883, 22 Ch. D. 478). But this case was decided in the face of several *dicta* to the contrary; and its authority has been somewhat shaken by a later *dictum* in very clear terms in a considered judgment of the Court of Appeal (*Green* v. *Marsh*, [1892] 2 Q. B. 330). At all events, it does not make the mortgagee a mortgagee in possession as between him and the mortgagor (*per* Lord Selborne, L.C., *Ex parte Harrison, re Betts, supra*).

By sec. 6 of the Bills of Sale Act, 1878, an attornment "whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." The object of this enactment was to make an attornment clause, if unregistered, void against an execution creditor or a trustee in bankruptcy, etc., if the goods seized were left in the possession or apparent possession of the mortgagor (see sec. 8 of the Act). It has, however, been held that attornment clauses are now within sec. 8 of the amending Bills of Sale Act of 1882, so that, if not registered, they are void even as between mortgagor and mortgagee (*Green* v. *Marsh*, [1892] 2 Q. B. 330; for a criticism of this case, as regards the application of the Act of 1882, see Weir on *Bills of Sale*, pp. 246-248). But though an unregistered attornment clause is void under the Bills of Sale Acts, in so far as the power to seize personal chattels is concerned (*Ex parte Kennedy, re Willis*, 1888, 21 Q. B. D. 384; *Green* v. *Marsh, supra*), want of registration does not affect the relation of landlord and tenant created under it; in an action by the mortgagee to recover possession of the land from the mortgagor, the writ may be specially indorsed under Order 3, r. 6 (*f*), and final judgment may be applied for under Order 14 (*Mumford* v. *Collier*, 1890, 25 Q. B. D. 279).

A proviso to sec. 6 protects "any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent." It has been held that this proviso applies only to a *bonâ fide* lease by a mortgagee who has actually taken possession, and not to a case where the demise is created by the mortgage deed itself (*Ex parte Kennedy, re Willis, supra*), nor to a case where the mortgagee, not having taken possession, enters into an agreement with the mortgagor for a modification of the terms of the tenancy (*Green* v. *Marsh*, [1892] 2 Q. B. 330).

[Smith, *Leading Cases*, 1903, vol. i.; Woodfall on *Landlord and Tenant;* Foà on *Landlord and Tenant;* Coote on *Mortgages;* Fisher on *Mortgages.* For the old law, see Co. Lit. (1832 ed.) 309*a*-325*a;* Sheppard's *Touchstone*, by Preston, chap. xiii. vol. ii. 253-266.]

Attraction.—This was a doctrine set up by the defendants in

the case of *Baker* v. *White*, 1875, L. R. 20 Eq. 166, on the authority of *Baker* v. *Parson*, 1872, 42 L. J. Ch. 228. In his judgment, however, Sir George Jessel, M.R., denied that any such doctrine existed. The facts of the case were as follows:—There was a devise of freeholds and copyholds in such terms that the devisee was held to take an equitable estate for life in the copyholds, and a legal estate for life, with a legal remainder to the heirs of his body, *i.e.* an estate tail in the freeholds. The defendants contended that the circumstance that the trustees of the will took the legal estate in the copyholds during the life of the devisee was an argument in favour of the trustee taking a legal estate also in the freeholds during his life. The argument was that the legal estate in the copyholds *attracted* the legal estate in the freeholds, by reason of the freeholds and copyholds being combined in one devise. The devisee claimed to be legal tenant in fee of both freeholds and copyholds, having executed a disentailing assurance shortly after the death of the testator. On a bill being filed for specific performance of a contract for sale, Sir George Jessel construed the will as stated above, and allowed a demurrer on the ground that the devisee took an equitable estate for life only in the copyholds; but he expressly held that the devisee had made a good title to the freeholds. The principle of the above case was applied in *Allen* v. *Bewsey*, 1877, 7 Ch. D. 453. See also *In re Brooke; Brooke* v. *Brooke*, [1894] 1 Ch. at p. 51; and *In re Townsend's Contract*, [1895] 1 Ch. at p. 720.

The term is also employed in peerage law, where it is known as the "doctrine of attraction," the principle being that if a barony in fee becomes vested in the tenant in tail male of an earldom, the descent of the barony follows the descent of the earldom, being thenceforward attracted by and inseparably connected with it. The same term has also been applied, though not with strict correctness, to cases where the holder of any peerage title becomes possessed of a higher title of the same designation. The principle of attraction is said still to be accepted as of authority in Scottish peerage law. In England it was several times argued in peerage cases in the early seventeenth century, but was, after being doubted in the case concerned with the *Earldom of Oxford* and the Baronies of *Bolebec*, *Sandford*, and *Badlesmere*, finally rejected in the *Grey de Ruthyn Case* (Collins, *Peeraye Claims*, p. 195), in which the Earl of Kent sought to prove that the Grey barony had been "attracted and absorbed" by his earldom. Since this case every peerage honour has been regarded as descendible, only having regard to its own creation and irrespective of holders of it who may also possess other peerages. Though no longer law, the proper appreciation of the principle is necessary for understanding fully the intricacies of peerage claims which date back for pedigree earlier than Stuart days. For authorities, see generally Cruise on *Dignities* (1823), pp. 115 *et seq.*, and the *Third Report on the Dignity of a Peer* (1829).

Auction, in Scotland called a *roup*, is, in its widest sense, a sale, however conducted, by which a person obliges himself to transfer property, or any interest therein, to the highest bidder, within the conditions of sale. The property may be either real or personal; it may be sold as a whole or in lots; and the property of several owners is frequently offered for sale at one and the same auction.

Ordinarily, a description of the property—in the case of realty called

particulars of sale, in the case of personalty a catalogue—and the conditions under which it will be sold (see CONDITIONS OF SALE; PARTICULARS OF SALE) are circulated in the sale-room, and the attention of those present called to them by the auctioneer when he puts up the property. The biddings proceed in order, each succeeding bid being higher than the preceding one, and the bidding being called by the auctioneer. The highest bidder is declared the purchaser, the acceptance of his offer being usually signified by the auctioneer striking his desk with his hammer.

To render the sale complete, the highest bidding must have been made by or on behalf of a person legally competent to contract (see CONTRACT), and accepted by the auctioneer, every bidding being but an offer on one side, which is binding on neither until assented to (*Payne* v. *Cave*, 1789, 3 T. R. 148; 1 R. R. 679; Sale of Goods Act, 1893, s. 58, subs. 2). Moreover, in a very large number of cases, there must, to make the contract enforceable, be a written memorandum of the same, signed by the party to be charged therewith, or his agent in that behalf (see CONTRACT; AUCTIONEER). On a sale in lots there is a separate contract in respect of each lot sold (*Emmerson* v. *Heelis*, 1809, 2 Taun. 38; 11 R. R. 520; Sale of Goods Act, 1893, s. 58, subs. 1).

In the absence of express reservation of a right to bid, the employment of a puffer, or person appointed to bid on behalf of the seller, is sufficient to avoid the sale; but the seller may expressly notify—on a sale of land such notification must appear in the particulars or conditions—that the sale is to be subject to a reserved price, or to a reserved right to bid; in the former case, the auctioneer withdraws the property, if the price is not reached; and in the latter, the seller or any one person on his behalf may bid (*Green* v. *Baverstock*, 1863, 14 C. B. N. S. 204; Sale of Land by Auction Act, 1867, ss. 4-6; *Gilliatt* v. *Gilliatt*, 1869, L. R. 9 Eq. 60, as to land; Sale of Goods Act, 1893, s. 58, subss. 3, 4, as to goods). The reservation of "a right to bid once" precludes the making of more than one bid (*Parfitt* v. *Jepson*, 1877, 46 L. J. C. P. 529); and an announcement that the sale is to be "without reserve," means that there will be no bidding by or on behalf of the seller, and that the property will be sold to the highest bidder (*Warlow* v. *Harrison*, 1859, 1 El. & El. 309; *Mainprice* v. *Westley*, 1865, 6 B. & S. 420). [Where an auctioneer by mistake announces a sale as without reserve, the vendor cannot subsequently rely on instructions to sell with a reserve, if the limitation is not communicated to the purchaser (*Rainbow* v. *Hawkins*, [1904] 2 K. B. 322).] A purchase induced by fraudulent means—as at a *mock auction*, where confederates of the seller, pretending to be genuine bidders, run up worthless articles to fancy prices—or by intimidation, cannot, of course, be enforced. But a vendor is not responsible for sham biddings made without his knowledge, or that of the auctioneer (*Union Bank* v. *Munster*, 1887, 37 Ch. D. 51). On the other hand, there must be no unfairness on the part of bidders, and a vendor may refuse to complete the sale if the highest bidder has conspired or wilfully interfered, with a view to depreciating the property, and deterring others from bidding (*Fuller* v. *Abrahams*, 1821, 3 Brod. & B. 116; 23 R. R. 626). An agreement between two intending purchasers not to bid against each other is not, however, illegal (*Galton* v. *Emuss*, 1844, 1 Coll. 243; 63 E. R. 402; *In re Carew's Estate*, 1858, 26 Beav. 187; 53 E. R. 869; *Heffer* v. *Martyn*, 1867, 36 L. J. Ch. 372); and so-called *knock-outs*

are common, *i.e.* where persons agree that one of them only shall bid for any particular article, and, after the sale, put up privately amongst themselves the goods that each has bought, dividing the difference between the price at which the goods were originally bought and that which was subsequently realised.

It is usual at auctions to require the payment of a deposit as a guarantee for the fulfilment of the contract, and also, if the contract is completed, as part payment of the purchase-money; the purchaser cannot elect to forfeit his deposit and avoid the contract (*Crutchley* v. *Jerningham*, 1817, 2 Mer. 502, 506; 35 E. R. 1032). It is paid either to the auctioneer or to the vendor's solicitor, and, as a general rule, is received by the former as stakeholder, by the latter as agent of the vendor (*Edgell* v. *Day*, 1865, L. R. 1 C. P. 80).

An auction sale is a useful method of ascertaining the market value of property, and *primâ facie* negatives the imputation of fraud (*Earl of Aldborough* v. *Trye*, 1840, 7 Cl. & F. 460: 7 E. R. 1145; 51 R. R. 32). It is commonly resorted to by trustees and on sales of estates under order of the Court, and there are certain statutory sales which must be made in this mode (see Bateman, *Law of Auctions*, 8). It is not, however, *per se*, a sale in market overt (*Lee* v. *Bayes*, 1856, 18 C. B. 599), nor will it, except under special circumstances, support a purchase by a person in a fiduciary position, *e.g.* a trustee or executor (*Beningfield* v. *Baxter*, 1886, 12 App. Cas. 167); mortgagee (*Martinson* v. *Clowes*, 1882, 21 Ch. D. 857); vendor's solicitor (*Ex parte Bennett*, 1805, 10 Ves. 381: 32 E. R. 893; 8 R. R. 1; *Parnell* v. *Tyler*, 1833, 2 L. J. Ch. 195; *Cutts* v. *Salmon*, 1852, 16 Jur. 623); or the auctioneer, either for himself or a third party (*Oliver* v. *Court*, 1820, 8 Price, 127; 22 R. R. 720; *Baskett* v. *Cafe*, 1851, 4 De G. & Sm. 388; 64 E. R. 88; Sugden, *Vendors and Purchasers*, 690).

Besides the ordinary auction, there are others now practically obsolete, or only in local use. Of these the most important are *Dutch auctions*, so called from their country of origin, and *sale by inch of candle*. In the former there is but one bidding, the property being put up at a high price, which is gradually decreased until some one closes with the offer. In the latter the biddings are kept open only for so long as a small piece of candle continues to burn, the lot being knocked down to whoever last bid before the light expired. It was prescribed for the sale of goods imported by the East India Co., and is occasionally resorted to in country districts in disposing of the rents of charitable property.

Apart from sales, leases and other interests in land are frequently let by auction.

Formerly there was a *pro ratâ* government duty imposed on auction sales, but this was abolished by 8 & 9 Vict. c. 15, s. 1.

[For treatises, see Babington, 1826; Bateman, 1895; Hart, 1895; Squibbs, 1891.]

[For Forms, see CONDITIONS OF SALE; PARTICULARS OF SALE.]

Auctioneer.—Any person, of either sex, may act as an auctioneer if duly licensed. For Excise provisions as to licences, etc., see EXCISE.

Although an auctioneer may sell his own property without disclosing that he is the owner, he generally acts as agent for another, and when so employed he is primarily the agent of the vendor. Apart from such cases as where he is specially employed merely to accept bids, his agency is a general one (*Howard* v. *Braithwaite*, 1812, 1 Ves. & Bea. 202, 210;

35 E. R. 79), and consequently—subject, as between him and the vendor, to his special instructions, and, as regards third persons, to their having notice of such instructions—authorises him to do all acts usually done by auctioneers—(*Collen* v. *Gardner*, 1856, 21 Beav. 540, 542; 52 E. R. 968. See PRINCIPAL AND AGENT). There are certain special kinds of sales, where particular duties are imposed upon the auctioneer (see Bateman, *Law of Auctions*, ch. xvi.); but, generally speaking, he surveys, values, and lots the property; advises as to the amount of the reserved price, the rules of bidding, and the time and place of sale; issues advertisements; and prepares particulars and plans, or catalogues: but the draft particulars should be submitted to the solicitor, who, in the case of real estate, is also the proper person to draw the conditions. If the goods which he is commissioned to sell, being upon premises occupied by his principal, are threatened with a lawful distress for rent, and, in order to prevent the distress from being made *before sale*, he promises to pay the rent, his principal will be bound to hold him harmless upon such promise, if a reasonable one under the circumstances (see judgments in *Sweeting* v. *Turner*, 1871, L. R. 7 Q. B. 310). Goods sent to premises in the occupation of the auctioneer, for the purpose of being sold by him, are not distrainable while there (*Brown* v. *Arundell*, 1850, 10 C. B. 54).

An employment to sell by auction does not authorise a sale by private contract (*Daniel* v. *Adams*, 1764, Amb. 495; 27 E. R. 222; *In re Loft*, 1843, 8 Jur. 206; *Marsh* v. *Jelf*, 1862, 3 F. & F. 234; but see Dart, 73); and, unless his employer consent to his delegating his duty, an auctioneer must conduct the sale himself (*Coles* v. *Trecothick*, 1804, 9 Ves. 234, 251; 32 E. R. 592; 7 R. R. 167; *Henderson* v. *Barnewall*, 1827, 1 Y. & J. 387; 30 R. R. 799), though he may employ others to assist him in subsidiary matters (*Commonwealth* v. *Harnden*, 1837, 19 Pickering, 482). As a general rule, the particulars and conditions cannot be contradicted, varied, or added to at the sale by verbal declarations of the auctioneer (*Gunnis* v. *Erhart*, 1789, 1 H. Black, 290; 2 R. R. 769). [In *In re Hare and O'Moore's Contract*, [1901] 1 Ch. 93, it was held that where an auctioneer distinctly corrected a misdescription in the particulars by a verbal statement made at the auction, the purchaser could not enforce the contract by specific performance, even if he did not hear the statement.] If, therefore, any error in them has been discovered since their first publication, it is his duty to carefully rectify the same, and to see that only corrected copies are distributed. An auctioneer has no implied authority to warrant goods (*Payne* v. *Lord Leaconfield*, 1882, 51 L. J. Q. B. 642). Where the sale is without reserve, he must sell the property to the highest bidder (*Mainprice* v. *Westley*, 1865, 6 B. & S. 420), and refuse any bid made by or on behalf of the seller (see AUCTION). He should also refuse bids made by persons labouring under a legal incapacity to contract, or standing in a fiduciary relation to the property. Except under special circumstances, he cannot buy, either for himself or a third party, the property he is employed to sell (*Oliver* v. *Court*, 1820, 8 Price, 127; 22 R. R. 720; *Baskett* v. *Cafe*, 1851, 4 De G. & Sm. 388; 64 E. R. 881; Sugden, V. & P. 690).

On the fall of the hammer, he becomes the implied agent of the highest bidder also, to write down his name as purchaser (*White* v. *Proctor*, 1811, 4 Taun. 209; 13 R. R. 580), and it is his duty to see that a binding contract is made. [*Quære*, whether an action will lie against

him for not so doing (*Rainbow* v. *Hawkins*, [1904] 2 K. B. 322).] If the sale be of real estate, or of goods to the value of £10 or upwards, and there has in the latter case been no acceptance or receipt of part, and nothing given in earnest or part payment, he should write down the name of the purchaser of each lot, together with the price bid, against the description of the lot in the particulars or catalogue, taking care that the conditions (and plan, if any) are incorporated therewith or distinctly referred to (*Kenworthy* v. *Schofield*, 1824, 2 Barn. & Cress. 945, 948; 26 R. R. 600). A mere entry in his sale-book is not sufficient, unless reference is clearly made therein to the particulars, or catalogue, and the conditions (*Peirce* v. *Corf*, 1874, L. R. 9 Q. B. 210; *Rishton* v. *Whatmore*, 1878, 8 Ch. D. 467). [Where a lot was knocked down to a bidder who had bid owing to his mistaking one lot for another, and who refused to sign the contract, the auctioneer signed it as his agent. The date in the conditions and form of contract was, owing to inadvertence, wrong. It was held that the vendor could not enforce specific performance (*Van Praagh* v. *Everidge*, [1903] 1 Ch. 434).] His clerk's authority is not so extensive, for, although the clerk can sign as agent for the seller (*Bird* v. *Boulter*, 1883, 4 Barn. & Adol. 443; 38 R. R. 285; *Dyas* v. *Stafford*, 1881, L. R. 7 Ir. 590; Dart, 209), he cannot so bind the purchaser without the latter's express assent (*Peirce* v. *Corf*, *supra*; *Sims* v. *Landray*, [1894] 2 Ch. 318). The auctioneer's authority to sign for the purchaser is limited to the auction; when employed to sell by private contract, he is agent for the seller only (*Mews* v. *Carr*, 1856, 1 H. & N. 484).

At or immediately after the sale, the auctioneer ought to disclose the name of his employer, if he wishes to avoid future responsibility as principal. (See PRINCIPAL AND AGENT.)

On a sale of goods, the auctioneer has implied authority to receive the proceeds of sale (*Williams* v. *Millington*, 1788, 1 H. Bl. 81; 2 R. R. 724), but on a sale of land he has no power, without express authority, to receive more than the deposit (*Sykes* v. *Giles*, 1839, 5 M. & W. 645). He has no general authority to give credit, or to receive payment otherwise than in cash (*Williams* v. *Evans*, 1866, L. R. 1 Q. B. 352); where, however, payment by cheque is customary, he may accept payment in that mode, provided he use reasonable caution (*Farrer* v. *Lacey*, 1885, 31 Ch. D. 42); but until the cheque is cashed he should refuse to hand over to the purchaser any document of title, and, on a sale of goods, he should refuse delivery (*Papé* v. *Westacott*, [1894] 1 Q. B. 272). If he receive the deposit expressly as agent for the vendor, he must pay it over to the latter on demand (*Edgell* v. *Day*, 1865, L. R. 1 C. P. 80); generally, he receives it as a stakeholder, in which case he should retain it until the contract is either carried into effect or rescinded, and the party entitled ascertained (*Harington* v. *Hoggart*, 1830, 1 Barn. & Adol. 577), and he may interplead, if in case of dispute either party threaten him with an action for the amount. (See INTERPLEADER.)

The auctioneer's right to sue and his liability to be sued upon the contract are, in general, the same as in the case of any other agent (see PRINCIPAL AND AGENT); but on a sale of goods he can bring an action for the price in his own name, though he contracted as agent only (*Robinson* v. *Rutter*, 1855, 4 El. & Bl. 954), unless he has himself signed the contract as agent for the buyer (*Farebrother* v. *Simmons*, 1822, 5 Barn. & Ald. 333; 24 R. R. 399).

The right to sue in the case of goods arises from his special property

in the subject-matter, for, whether the sale be on the premises of the owner or in a public auction-room, he has a possession coupled with an interest in the goods, and he can maintain an action against any one who wrongfully removes them out of his possession (*Williams* v. *Millington*, 1788, 1 H. Bl. 81, 85; 2 R. R. 724). It is his duty to take the same care of goods intrusted to him for sale as a prudent man would of his own (*Maltby* v. *Christie*, 1795, 1 Esp. 340; see BAILMENTS). He must also be ready to return to his principal any property that remains unsold, and to account to him for the proceeds of the sale (*Crosskey* v. *Mills*, 1834, 1 C. M. & R. 298). So long as the goods, or deposit, or purchase-money, are in his possession, he has a particular lien upon them for his commission and expenses (*Williams* v. *Millington*, *supra*; *Woolfe* v. *Horne*, 1877, 2 Q. B. D. 355; *Webb* v. *Smith*, 1885, 30 Ch. D. 192).

An auctioneer is generally remunerated by a commission on the amount realised, or, if no sale has been effected, on the reserved price, which may or may not include incidental expenses. In some cases, such as sales under distraints for rent or County Court process, his charges are regulated by statute; otherwise they are subject to agreement between himself and his employer; in the absence of an agreement, he is entitled to a reasonable remuneration (*Eicke* v. *Meyer*, 1813, 3 Camp. N. P. 412; *Cohen* v. *Paget*, 1814, 4 Camp. N. P. 96; *Rainey* v. *Vernon*, 1840, 9 Car. & P. 559). His right to commission may, however, be forfeited if there has been negligence or irregularity on his part (*Denew* v. *Daverell*, 1813, 3 Camp. N. P. 451; *Kirkman* v. *Booth*, 1848, 11 Beav. 273; 50 E. R. 821; *Furber* v. *Cobb*, 1857, 18 Q. B. D. 494). In the north of England a custom largely prevails, on sales of realty, of paying the auctioneer by a fixed fee, for which he simply attends the auction-room to knock down the property, the general control of the proceedings being in the hands of the solicitor. And under the general order made in pursuance of the Solicitors' Remuneration Act, 1881 (see SOLICITOR), a scale of charges is fixed where the vendor's solicitor conducts or negotiates a sale of real property. This scale only applies where no remuneration has been paid by the client to the auctioneer for offering the property (*Burd* v. *Burd*, 1889, 40 Ch. D. 628; *Drielsma* v. *Manifold*, [1894] 3 Ch. 100).

If an auctioneer receive into his possession goods to which his principal has no title, and, on selling them, delivers them to the purchaser, he is liable to the real owner for the conversion (*Cochrane* v. *Rymill*, 1879, 40 L. T. 744; *Barker* v. *Furlong*, [1891] 2 Ch. 172; *Consolidated Co.* v. *Curtis*, [1892] 1 Q. B. 495); and if, after having received the deposit or the purchase-money, he pays it over to his employer, after notice that the title of the latter was bad, he will be liable for the money (*Burrough* v. *Skinner*, 1770, 5 Burr, 2639; *Peto* v. *Blades*, 1814, 5 Taun. 657; 15 R. R. 609). He is not, however, liable to the true owner if he merely brought the vendor and purchaser together, and they completed the bargain without further intervention on his part (*National Mercantile Bank* v. *Rymill*, 1881, 44 L. T. 767; *Turner* v. *Hockey*, 1887, 56 L. J. Q. B. 301); nor if the goods are within the disposition of his principal within the Factors Act, 1889, and he acted in good faith and without notice of any claim by a third party. (See FACTOR.)

The Surveyors' Institution, incorporated by royal charter in 1881, and the Auctioneers' Institute, have been founded with a view to

promoting, by means of examination and otherwise, the efficiency of auctioneers and surveyors.

For bibliography, see AUCTION. For Forms, see CONDITIONS OF SALE; PARTICULARS OF SALE.

Audience, in diplomatic language, is an interview granted by the sovereign or chief authority of a State to foreign ambassadors, ministers, or other public envoys.

Audience, Right of.—See ADVOCATE; SOLICITOR.

Auditor.—An auditor may be described as a person whose duty it is to examine the accounts of a company, firm, or person, so as to ascertain the exact state of affairs financially at a given moment. This involves not only a scrutiny of the figures, but also an examination of the form and substance of the accounts, in order to see that they truly represent the state of affairs purporting to be represented by them. The position of an auditor, his rights and liabilities, depend very much upon the circumstances under which, and upon the purposes for which, he is appointed. Auditors may be divided into two classes, official and private auditors; the former are officers connected with, or appointed by, some government department; the latter are professional men or amateurs, selected by the parties interested in the work to be done. Private auditors, again, may be divided into two classes, the one consisting of those who are appointed by private individuals, under no statutory or other legal obligation to appoint auditors; the other consisting of auditors, unconnected with any official department, but appointed by those interested, in compliance with law. The duties of the former class of private auditors depend on the instructions given and the agreement made (tacitly or expressly) at the time of the appointment; the duties of the latter class are modified by the statutes which require the appointment of the auditor.

An auditor may be required to audit accounts on behalf of traders who desire to find out their true financial position, or who desire some check upon their accountancy department; he may be employed to report on the accounts with a view to the conversion of a business into a joint-stock company; he may be desired by a committee of shareholders to investigate and make a special report on the company's affairs. In all these and similar cases his duty and his rights must depend upon the contract entered into by him with the parties who engage him. All auditors (omitting governmental auditors, who often stand in a peculiar position) are bound to exercise such skill, care, and caution as a reasonably competent, careful, and cautious auditor would use (*per* Lopes, L.J., *In re Kingston Cotton Mills Co., No.* 2, [1896] 2 Ch. 288). An auditor must be honest, he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that which he certifies to be true (*In re London and General Bank*, [1895] 2 Ch. 683). What is reasonable care, and what is ordinary competency, are matters of fact (*ibid.*, at p. 683). It may be suggested, that if a man employs a carpenter to audit complicated partnership accounts, he may not complain if the audit is not conducted with the skill of a member of the Institute of Chartered Accountants. But if the auditor be a professional accountant, the fact that he has

not the skill requisite would be no answer to proceedings for negligence, if the standard of the work done falls short of that which would be reached by a professional auditor, properly equipped and prepared for his business.

The liability even of a professional auditor does not arise unless he has been negligent. He must not be taken to guarantee the discovery of all fraud (*In re Kingston Cotton Mills Co., No.* 2, [1896] 2 Ch. 289); for, as Lindley, L.J., pointed out, an auditor is not an insurer; he is bound to take reasonable care, and if he does so he is not responsible for undiscovered fraud (*In re London and General Bank*, [1895] 2 Ch. 683). In respect of his duties, the professional auditor is in the same position as a member of any other profession; if a man holds himself out as an expert, he must at his peril come up to the standard of competence which the average man of his class habitually reaches; if he does this, he is liable only for actual negligence, but not for mere mistakes, nor for mere errors of judgment. Moreover, it is submitted that, though negligent, the auditor is, apart from statutory provision, liable only to those who employ him (*Le Lievre* v. *Gould*, [1893] 1 Q. B. 491). See *Purves* v. *Landell*, 1845, 12 Cl. & Fin. 91; 8 E. R. 1332, a case relating to a solicitor; and see Beven on *Negligence*, p. 1426 *et seq.*

[If an auditor is employed to audit accounts for a special purpose, and is in fact ignorant of that purpose, the parties may have his certificate set aside and a new audit made, if the knowledge of the special purpose would have induced the auditor to adopt a different plan in dealing with the accounts, even if the parties have agreed that his certificate is to be conclusive (*Teacher* v. *Calder*, [1899] A. C. 451 (H. L. Sc.)).]

When an auditor is appointed, in pursuance of the requirements of a statute, his duties will often be prescribed by the statute itself, and may by it be increased or modified. The following are the more important examples:—

1. *Public Companies.*—(*a*) Under the Companies' Clauses Act, 1845, 8 Vict. c. 16, ss. 101-118, auditors must be appointed by the company from amongst the shareholders who hold no office in the company, and the auditors, having duly received the periodical accounts and balance-sheet, must examine the same and report thereon. The auditors may employ accountants or other persons at the expense of the company, and one auditor may do this, though the other dissents (*Steele* v. *Sutton Gas Co.*, 1883, 12 Q. B. D. 68).

(*b*) Companies Acts, 1862-1900. [The Companies Act, 1900, 63 & 64 Vict. c. 48, ss. 21-23, makes the appointment of auditors compulsory. The duties of auditors in relation to these companies will be dealt with under the heading COMPANY. Before the passing of this Act the appointment of auditors was rendered compulsory by the Companies Act, 1879, 42 & 43 Vict. c. 86, s. 7, in the case of banking companies.] Their duties are fairly well settled, and may be summarised thus:—(1) The auditor must not confine himself merely to the task of verifying the arithmetical accuracy of the balance-sheet, but must inquire into its substantial accuracy, and ascertain that it contains the particulars specified in the articles of association—the provisions of which he is bound to know—and is properly drawn up, so as to contain a true and correct account of the state of the company's affairs (*Leeds Estate Building and Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787). (2) The auditor must ascertain the true financial position of the company by an

examination of the books, and must take reasonable care to see that the books themselves show the company's true position; he should check the balance-sheet against the books, and examine it with the vouchers, and make a report to the shareholders (*In re Kingston Cotton Mills, No.* 1, [1896] 1 Ch. 6; *In re London and General Bank,* [1895] 2 Ch. 682-3). (3) An auditor is not bound to be suspicious, and he is perfectly justified in acting on the opinion of experts whose special knowledge enables them to assist him; he may believe tried servants in whom the company placed confidence. But if anything occurs to arouse his suspicion, he must probe the matter to the bottom, and he must use reasonable care not to allow himself to be deceived (*In re Kingston Cotton Mills, No.* 2, [1896] 2 Ch. 284, 288), Moreover, an auditor should not rely to any considerable extent on conversations with the directors; he must examine the books, vouchers, and commercial documents for himself (*In re New Oriental Bank Corporation, Times,* 17th Dec. 1892). (4) The auditor must report to the shareholders anything of a serious nature; *e.g.* he does not fulfil his duty if he merely points out to the directors that the dividend about to be declared has not been earned; he must take care to bring this information to the shareholders; and giving means of information is not the same thing as giving information (*In re London and General Bank,* [1895] 2 Ch. 685). (5) It is no part of an auditor's duty to take stock, and an auditor may rely upon false stock certificates, produced by the proper persons, provided that the falsity would not be discovered by an ordinarily careful auditor (*In re Kingston Cotton Mills, No.* 2, *supra*). (6) In one case (*Spackman* v. *Evans,* 1868, L. R. 3 H. L. 171), Lord Chelmsford said that it is no part of the auditor's duty to inquire into the validity of any transactions appearing in the account; but this is hardly in accord with the modern views, nor in practice do auditors act upon this view of the law. But the auditor fulfils his functions if he reviews the accounts, and reports to the members; he is not expected, nor allowed, to manage the business, nor is it even his duty to give advice as to this (*In re London and General Bank, supra*). Auditors often advise as to the form of accounts they think best, and this is within their functions.

If the auditor of a company neglects his duties, he is liable to an action for negligence, and may be cast in such damages as are the direct result of his neglect (*Leeds Building and Investment Co.* v. *Shepherd,* 1887, 36 Ch. D. 787). Can he be proceeded against under sec. 10 of the Companies Winding-up Act, 1890? Of course, until the company is in liquidation, he cannot; but in two cases, in which the company was being wound up, auditors have been attacked under this section. In *In re London and General Bank,* [1895] 2 Ch. 161, the Act of 1879, *supra,* applied, but in the subsequent case (*In re Kingston Cotton Mills, No.* 1, [1896] 1 Ch. 6), the company whose affairs were under consideration was not a banking company. In both cases the Court of Appeal decided that where an officer commits a breach of duty to the company, the direct consequence of which has been a misappropriation of assets for which he could be held responsible in a civil action, such breach of duty is a misfeasance within sec. 10 of the Winding-up Act, 1890. It was also decided that the auditor was in each case an "officer" within the meaning of the section, but the Court of Appeal laid down no rule of general application on this point. It is unfortunately still doubtful whether an auditor is an officer within the section, for an appeal on this

point to the House of Lords in the *Kingston Case* was abandoned, owing to the success of the auditor in proving that he had not been negligent. An auditor who is negligent cannot be sued after the lapse of six years from the time when the cause of action first arose (*Leeds Building and Investment Co.* v. *Shepherd*, 1887, 36 Ch. D. 787).

2. *Building Societies.*—In a registered society, the rules must provide for the appointment of auditors (37 & 38 Vict. c. 42, s. 15); and the Act of 1894, 57 & 58 Vict. c. 47, provides that the auditor shall certify that the statutory annual account is correct, duly vouched, and in accordance with law, or shall specially report to the society in what respect he finds it otherwise; further, he must certify that he has actually inspected the mortgage deeds and other securities belonging to the society, and must state the number of properties with respect to which deeds have been produced to and actually inspected by him. One at least of the auditors must be a person who publicly carries on the business of an accountant (57 & 58 Vict. c. 47). See ACCOUNTANT.

3. *Friendly and Industrial Societies.*—The Industrial Societies Act, 1893, 56 & 57 Vict. c. 39, s. 13, and the Friendly Societies Act, 1896, 59 & 60 Vict. c. 25, s. 26, provide that the accounts of the society must be submitted to certain public auditors appointed by the Treasury, or to two or more persons appointed as the rules provide. In either case the auditors must verify the annual return with the accounts and vouchers, and shall either sign the return as found by them to be correct, duly vouched and in accordance with law, or must specially report to the society or branch wherein it fails. [These regulations are applied to shop clubs by the Shop Clubs Act, 1902, 2 Edw. VII. c. 21. See also Treasury regulation of January 1, 1903, with reference to friendly societies desirous of being certified under the above Act.]

Miscellaneous.—There are numerous statutes which contain clauses dealing with the auditing of the accounts of matters to which the statutes relate. These it would be impossible within due limits to set out. Reference may be made to the following statutes and sections where the more important of them may be found:—Public Health Act, 1875, 38 & 39 Vict. c. 55, ss. 246, 247; Municipal Corporation Act, 1882, 45 & 46 Vict. c. 50, ss. 25, 27; Sheriffs Act, 1887, 50 & 51 Vict. c. 55, ss. 21, 22; Local Government Acts, 1888 and 1894, 51 & 52 Vict. c. 41, ss. 27 (2), 71-73; 57 & 58 Vict. c. 73, s. 58; Elementary Education Acts, 1870 and 1873, 33 & 34 Vict. c. 86, ss. 17, 18; 36 & 37 Vict. c. 75, s. 60; Lunacy Act, 1890, 53 & 54 Vict. c. 5, ss. 234, 279; Housing of the Working Classes Act, 1890, 53 & 54 Vict. c. 70, s. 80; District Auditors Act, 1879, 42 & 43 Vict. c. 6, ss. 2-6; Oxford and Cambridge Universities Act, 1877, 40 & 41 Vict. c. 48, s. 11; Metropolis Water Act, 1871, 34 & 35 Vict. c. 113, ss. 38, 40, 41, 42; Railway Companies Acts, 1867, 30 & 31 Vict. c. 127, s. 30; 31 & 32 Vict. c. 119, ss. 11 and 12.

The remuneration of auditors is a matter of arrangement, and the ordinary rules governing other contracts of employment govern this question. The provisions of the articles of association of a company as to remuneration will, in the absence of special arrangement, be binding on the auditors.

[For information on the practical details of auditing, see Pixley on *Auditors*, and Dicksee on *Auditing*.]

Australasia, a quarter of the world including Australia,

Tasmania, New Zealand, New Guinea, and various groups of islands in the Pacific Ocean. By Act of Parliament, passed in 1885, power was given to create a Federal Council; each Crown colony to have one representative, and each self-governing colony two. The Act was not to come into operation until the legislatures of four colonies had passed Acts or Ordinances for the purpose. Acts were passed by New South Wales, Victoria, South Australia, and Tasmania in 1895-96. A number of Acts were passed by the Federal Council. But see AUSTRALIA, *infra.*

Australia, an island continent forming part of Australasia, now entirely occupied or controlled by Great Britain. It includes the colonies of New South Wales, Victoria, Western Australia, and Queensland, and the province of South Australia. All these have received responsible government. The laws administered in the Australian colonies are English in their origin, except in so far as native customs are allowed to subsist.

Commonwealth of Australia.—The Commonwealth of Australia was constituted by the Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict. c. 12, and includes New South Wales, Victoria, South Australia, Queensland, and Tasmania. Provision is made for the admission of other colonies and territories into the Commonwealth (see *ibid.*, ss. 6, 9; c. 3, ss. 121-124).

The High Court of Australia.—The judicial power of the Commonwealth is vested in a Federal Supreme Court, called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction. The High Court consists of a Chief Justice, and so many other justices, not less than two, as the Parliament prescribes (and see now the Australian Commonwealth Judiciary Act, 1903).

The High Court has jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—(1) of any justice or justices exercising the original jurisdiction of the High Court; (2) of any Federal Court, or Court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lay to the King in Council (see 63 & 64 Vict. c. 12, s. 101); (3) of the Inter-State Commission, but as to questions of law only, and the judgment of the High Court in all such cases is final and conclusive.

But no exception or regulation prescribed by the Parliament is to prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay from such Supreme Court to the Privy Council. Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the King in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court (*ibid.* s. 73).

No appeal is to be permitted to the King in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the

question is one which ought to be determined by His Majesty in Council (*ibid.* s. 74).

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to His Majesty in Council on the question without further leave. Except as provided in this section, the Constitution does not impair any right which the King may be pleased to exercise by virtue of his royal prerogative to grant special leave of appeal from the High Court to His Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for His Majesty's pleasure (*ibid.* s. 74).

In all matters—(1) arising under any treaty; (2) affecting consuls or other representatives of other countries; (3) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; (4) between States, or between residents of different States, or between a State and a resident of another State; (5) in which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth, the High Court has original jurisdiction (*ibid.* s. 75).

The Parliament may make laws conferring original jurisdiction on the High Court in any matter—(1) arising under the Constitution, or involving its interpretation; (2) arising under any laws made by the Parliament; (3) of Admiralty and maritime jurisdiction; (4) relating to the same subject-matter claimed under the laws of different States (*ibid.* s. 76).

With respect to any of the matters mentioned in the last two sections the Parliament may make laws—(1) defining the jurisdiction of any Federal Court other than the High Court; (2) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States; (3) investing any Court of a State with federal jurisdiction (*ibid.* s. 77).

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power (*ibid.* s. 78).

The federal jurisdiction of any Court may be exercised by such number of judges as the Parliament prescribes (*ibid.* s. 79).

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

The Constitution of each State of the Commonwealth, subject to the Constitution, continues as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State. The right of appeal to the Privy Council from the Supreme Courts of the several States is taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39 (2), and the only appeal from such Courts now lies to the High Court of Australia, except in cases pending when the Act was passed (*Colonial Sugar Refining Co., Ltd.*, v. *Irving*, [1905] A. C. 369).

Every law in force in a colony which has become or becomes a State,

and relating to any matter within the powers of the Parliament of the Commonwealth, subject to the Constitution, continues in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State has the former powers of alteration and repeal in respect of any such law.

Author.—English law gives no definition of an author; it would indeed be difficult to fix on any form of words to include operations so diverse as those of the poet, the law reporter, the compiler of a post-office directory, and the photographer, all of whom—and many others—have established their legal title to the name. "One who by his own intellectual labour, applied to the materials of his composition, produces an arrangement or compilation new in itself," the definition by an American judge in *Atwill* v. *Ferrett*, 1840, 2 Blatch. 46, is fairly comprehensive for copyright purposes, although, naturally, it does not include that rendered necessary by the Artistic Copyright Act, 25 & 26 Vict. c. 68. (See COPYRIGHT.)

In his relations with the publisher the author is subject to the ordinary law of contract. If he contracts to write a book or an article, he must produce one of the quality agreed upon, but the contract is a personal one, and will not form the ground of an action for specific performance (*Clark* v. *Price*, 1819, 2 Wils. Ch. 157; 37 E. R. 270; 18 R. R. 159).

If a series of articles is ordered by a publisher, and the periodical ceases to appear before the series is complete, the author may sue for work done on a *quantum meruit*, without completing delivery (*Planché* v. *Colburn*, 1831, 5 Car. & P. 58; 34 R. R. 613). The law takes no direct cognisance of literary merit, but if an author writes a book, to appear under his own name, the publisher may not issue another edition so altered as to contain errors and mistakes calculated to injure the writer's reputation as an author (*Archbold* v. *Sweet*, 1832, 5 Car. & P. 219; 38 R. R. 810); Lord Tenterden, C.J., explained in this case that the principle involved was analogous to that in the cases of "perfumers and fish-sauce makers." (See also ENCYCLOPÆDIA.)

In actions of libel, modern law, in the case of printed matter, takes little or no cognisance of the author. Publication is the ground of action, and the publisher cannot throw back his responsibility on the writer. The name of the author is immaterial, and the Court will not compel the publisher to disclose it (*Hennessey* v. *Wright*, No. 2, 1888, 36 W. R. 879; *Gibson* v. *Evans*, 1889, 23 Q. B. D. 384). (See DEFAMATION.) Nor, it would appear, can a publisher recover from an author who has involved him in damages for libel; but if the author has given the publisher an indemnity, in the case of a publication not in itself obviously illegal, the publisher could probably recover (see a discussion of this point by Lord Lyndhurst and Baron Alderson in *Colburn* v. *Patmore*, 1834, 1 C. M. & R. 73; 40 R. R. 493). As to Assignment, see *Hole* v. *Bradbury*, 1879, 12 Ch. D. 836; *Griffith* v. *Tower Publishing Co.*, [1897] 1 Ch. 21.

Authorised Improvements.—See LIFE, ESTATES FOR.

Authority, False Representations as to.—See PRINCIPAL AND AGENT.

Auto-Motor Cars.—See MOTOR CARS.

Autre vie.—See LIFE, ESTATES FOR.

Autrefois Acquit, Autrefois Convict.—A person who has once been lawfully acquitted or convicted of any offence cannot be re-tried for the same offence. Even if circumstances of aggravation are alleged on the second trial, or serious consequences to the victim of the offence have followed on the previous trial, a man must not be put twice in peril for the same offence (Hawk., P. C., bk. ii. c. 36; Arch. Cr. Pl., 23rd ed., 169). It is immaterial where the first conviction or acquittal was, and whether it took place within or without the King's dominions or was in a foreign country, or was summary or on indictment (*R.* v. *Miles*, 1890, 24 Q. B. D. 423, and *R.* v. *Roche*, 1775, 1 Leach, 125), provided that the Court of trial was of competent jurisdiction, and the indictment or accusation was sufficient in law to sustain a conviction for the offence charged on the second trial (*R.* v. *Clark*, 1820, 1 B. & B. 473), and if erroneous was not reversed or set aside by writ of error or otherwise (*R.* v. *Drury*, 1849, 18 L. J. M. C. 189). It is also immaterial whether the prosecution is on the same statute or for the same common-law offence, so long as the facts constituting the offence are substantially the same (Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 33; *Wemyss* v. *Hopkins*, 1875, L. R. 10 Q. B. 378; *R.* v. *King*, [1897] 1 Q. B. 214, 218). The defence is raised by plea in bar of autrefois acquit or autrefois convict. If successful, it effectually stops the prosecution. If it fails in cases of misdemeanor, judgment for the Crown is entered on the indictment. In treason or felony, the defendant failing on the plea of autrefois acquit or convict is allowed to plead not guilty.

These pleas may be pleaded orally by the accused saying, when arraigned, that he has been lawfully acquitted or convicted of the offence charged (14 & 15 Vict. c. 100, s. 28). But a formal plea in parchment, signed by counsel, is usually required. As to the present form, see *R.* v. *Connell*, 1853, 6 Cox C. C. 178; Arch. Cr. Pl., 23rd ed., 172. It is now usual to combine with these pleas a plea of not guilty (*R.* v. *Drury*, 1849, 18 L. J. M. C. 189). A jury is sworn to try separately the issue raised by the plea of autrefois acquit or convict, and the burden of proof is on the defendant (*R.* v. *Roche*, 1775, 1 Leach, 125). Proof of the previous conviction or acquittal is made by production (1) of the record of the former trial; (2) of a certificate thereof, made under 14 & 15 Vict. c. 99, s. 13, or in the case of a conviction, 34 & 35 Vict. c. 112, s. 18; or (3) in the case of summary convictions or acquittals, of a certificate by the clerk of the peace of the county or borough where the previous trial took place, if they have been returned into his office, otherwise by a certificate of the clerk to the Petty Sessional Court, or justices making the conviction (42 & 43 Vict. c. 49, s. 27 (3)); or in the case of a conviction, by a copy of the conviction purporting to be signed by a justice, the clerk of the peace, or the justices' clerk (34 & 35 Vict. c. 112, s. 19; *R.* v. *Miles*, 1890, 24 Q. B. D. 423. See also *Commissioner of Peace* v. *Donovan*, 1903, 1 K. B. 895). A person tried on indictment is on acquittal entitled to a copy of his indictment (see Arch. Cr. Pl., 23rd ed., 227, 228); on acquittal by a Court of summary jurisdiction the defendant is entitled to have a certificate of dismissal (11 & 12 Vict. c. 43, s. 14). As to the case of

dismissal of a charge of assault, on the merits, see 24 & 25 Vict. c. 100, ss. 42, 43.

The accused must also be identified with the person previously tried. The previous conviction or acquittal is insufficient to sustain the plea in the following cases:—(1) Where the accused was not in jeopardy on the former charge, *i.e.* where it would not have supported a legal conviction for the offence charged on the second trial; (2) Where the subsequent charge is of murder, manslaughter, or rape, following upon a previous trial for assault or arson (*R.* v. *Morris*, 1867, L. R. 1 C. C. R. 90; *R.* v. *Miles*, 1890, 24 Q. B. D. 423, 433; *R.* v. *Serné*, 1887, 107 Cent. Crim. Ct. Sess. Papers, 418; (3) In cases of assault, where the accused, if convicted or sentenced to fine or imprisonment, has not paid the fine or undergone the punishment (24 & 25 Vict. c. 100, s. 45. Hereon see also Arch. Cr. Pl., 23rd ed., 169-177; Hawk., P. C., bk. ii. cc. 35, 36, ss. 10-17; Mayne, *Criminal Law of India*, 1896, 905-911; and Russ. on *Crimes*, 6th ed., 38).

Autrefois Attaint.—A plea in bar now obsolete, owing to the abolition of attainder by the Forfeiture Act, 1870, 33 & 34 Vict. c. 23, s. 1, except in cases of outlawry, itself virtually obsolete. Since 1826, it could be pleaded only where the attainder was for the same offence as that charged in the indictment (7 & 8 Geo. IV. c. 28, s. 4; see Fost., 2nd ed., 41-44, 110-113; Arch. Cr. Pl., 23rd ed., 177; 3 Co. Inst. 213).

Autrefois Convict.—See AUTREFOIS ACQUIT.

Auxiliary Forces.—See MILITIA; YEOMANRY; VOLUNTEERS.

Average.—The meaning and origin of the word average are doubtful. It has been variously derived—from the Latin *aversio* (throwing overboard), from the Italian *avere* (property) or *varea* (contribution), and again from the German *haferei* (sea damage), and seems to have come to us through the French *avarie*. The following definitions have been given of it:—"In a marine sense, average and contribution are synonymous terms." "Average signifies the contribution to a general loss" (Park, 201). "Average is a term used in commerce to signify a contribution made by ship freight and goods on board a ship, in proportion to their respective interests, towards any particular loss or expense sustained for the general safety of the ship and cargo, in order that the particular sufferer may not in the end be a greater loser than the rest of the persons interested in the ship and goods on board. Average, then, understood in this sense, is called general or gross average, because it falls upon the whole or gross amount of the ship freight and cargo, and also to distinguish it from what is often, though improperly, termed particular average, but which in truth means a particular or partial, and not a general loss, and has no affinity to average, properly so called" (Marshall, 424). General and particular average are distinguished in the *Guidon de la Mer* of 1580, and the Ordonnance of Louis XIV. of 1681. "The general contribution that is to be made by all parties towards a loss sustained by one for the benefit of all is sometimes called by the name of *general average*, to distinguish it from *special* or *particular average*—a very incorrect

expression used to denote every kind of partial loss happening either to ship or cargo from any cause whatever, and sometimes by the name of *gross average*, to distinguish it from *customary average* mentioned in bills of lading, which latter species is also sometimes called *petty average*" (Abbott, 751; see Lord Stowell, in *The Copenhagen*, 1799, 1 Rob. C. 289). If, however, average means loss (*aversio*), the use of the words *general* and *particular* in connection with it is necessary to show the incidence of the loss, which will depend on whether it be incurred for a *general* or *particular* benefit.

General Average.—This phrase is used to denote either the act which voluntarily causes the loss, or the loss consequent on that voluntary act, or the contribution levied on the whole adventure, in order to put the loser on the same footing as his co-adventurers (Arn. 906; Carver, 365). For purposes of arrangement, the whole subject may be considered under the following heads:—1. The origin and basis of the principle of general average. 2. The essentials of a general average act. 3. The two kinds of general average losses, namely, sacrifices and expenditures. 4. Contribution to general average losses, and its exceptions. 5. What contributes to general average. 6. The principle and amount of contribution. 7. The apportionment or adjustment of the contribution. 8. The adjustment of general average. 9. Its relation to insurance.

In practice rights and obligations in general average are generally the subject of express contract; and a code of rules known as York-Antwerp Rules of General Average, formulated by the International Law Association at Antwerp in 1877, and revised by it at Liverpool in 1890, has been generally adopted for regulation of these various questions. For discussion of differences of practice in estimating contributory and contributing values, see *International Law Association, Antwerp Conference, Report*, 232, paper by Mr. Elmslie.

1. *Origin and Basis of the Principle.*—The principle is derived from the Rhodian law (*Lege Rhodiâ cavetur ut si levandæ navis gratia jactus mercium factus sit omnium contributione sarciatur quod pro omnibus datum est: Digest*, xiv. 2), by which it was apparently applied only to a case of jettison, or throwing goods overboard. It was extended by the Roman law to all cases of sacrifice (*Digest*, xiv. 2), became embodied in the general maritime law (*e.g.* the laws of Oleron), and was thence incorporated into English law. What is the basis of the obligation so imposed on the parties to a marine adventure is not clearly established. Some authorities base it upon an implied contract between those interested in the adventure to mutually indemnify each other (Lord Bramwell, *Wright* v. *Marwood*, 1881, 7 Q. B. D. 62); and perhaps, as between a shipper of goods and a shipowner, such a contract may be implied (Lord Blackburn, *Anderson* v. *Ocean Steamship Co.*, 1884, 10 App. Cas. 107); but as between one shipper and another, there seems to be no such relation apart from express contract. The more favoured view is that the mere fact of shipment of goods subjects the shipper to this general maritime liability, by which he undertakes implicitly to indemnify his co-shippers as well as the shipowner. "The obligation to contribute depends not so much on the terms of any particular instrument as on the general rule of maritime law" (Lord Tenterden in *Simmonds* v. *White*, 1824, 2 Barn. & Cress. 805). "The liability to contribute does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as

the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute for the loss of property which is sacrificed by one in order that the whole adventure may be saved" (Lord Esher in *Burton* v. *English*, 1884, 12 Q. B. D. 218; Arn. 908, note; Carver, 364). "The principle upon which contribution becomes due does not appear to differ from that upon which claims for recompense for salvage services are founded. In jettison the rights of those entitled to contribution have their origin in the fact of a common danger, which threatens to destroy them all; and those rights and obligations are mutually perfected wherever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby saved" (Lord Watson in *Strang, Steel & Co.* v. *Scott*, 1889, 14 App. Cas. 608). The chief effect of adopting this view is that it will require express words in the contract under which goods are shipped to exclude the rule of general average contribution; thus, under a charter-party exempting the shipowner from liability for any act, neglect, or default whatsoever of their servants during the voyage, it was held that the shipowner could recover a general average contribution from the shippers, when the loss necessitating that general average was due to the negligence of the shipowner's servants, on the ground that the conditions ordinarily existing between shipper and shipowner had been varied by the contract (*The Carron Park*, 1890, 15 P. D. 203; *Milburn* v. *Jamaica F. I. and T. C. of London*, [1900] 2 Q. B. 541).

2. *Characteristics of General Average Acts.*—The master or the person who is in charge of the whole adventure decides whether a loss is to be incurred; and only an act done by the master or person in charge of the ship, or with his sanction and authority, and not by a stranger to the ship, can be general average. But if he authorises the act of that stranger, it is general average; *e.g.* if a vessel is on fire in a port full of shipping, and is scuttled by the port authority (who has been sent for by the master) for the general safety of the shipping, this being the best thing to do for the general interest of the ship, with the consent of the master, it is a general average act (*Papayanni* v. *Grampian Steamship Co., The Birkhall*, 1896, 12 T. L. R. 540); and the American law is the same (*Ralli* v. *Troop*, 1894, 157 U. S. R. 386). So jettison by a prize crew after the ship had been captured, with the approbation and under the direction of the original mate of the vessel, has been held to be general average (*Price* v. *Noble*, 1811, 4 Taun. 123; 13 R. R. 566). The following conditions are also essential to make a loss general average:—(*a*) It must be an intentional act of man, as distinguished from the force of the elements, *e.g.* if a ship thrown on her beam-ends in a storm is righted by cutting away masts or throwing cargo overboard, it is a general average loss, while if she rights herself owing to the mast snapping or the cargo washing overboard, it is a particular average loss, to be borne by ship and cargo respectively; (*b*) it must be of an extraordinary and an unusual nature, outside the scope of the shipmaster's usual duties; (*c*) it must be for the good of the common adventure, and not for that of a single interest only; (*d*) it must be to avert a loss of the whole adventure; (*e*) it must be done under circumstances which admit of no alternative, or, in other words, the danger must be imminent. But it is not necessary that the act, in order to be general average, should be successful, *i.e.* that it should be the actual cause of the safety of the whole adven-

ture, although some of the adventure must be ultimately saved in the case of a general average sacrifice, or there will be no interests to make contribution (Arn. 912; Carver, 372; Lowndes, 38). If the ship perish by the very peril to avert which the act was done, it seems that any cargo that is saved will nevertheless contribute to the sacrifice; and if the ship survive that peril, but is eventually wrecked before the end of her voyage, all that is saved from the wreck contributes to the sacrifice (Phillips, 1354); but not where the general average act benefits the property meant to be sacrificed (Carver, 373). The modern English opinion seems to disregard the success of the general average act altogether (Arn. 979-80). The object of a general average act in England is the immediate safety of the adventure, and not the ultimate, as generally on the Continent and in the United States.

3. *General Average Losses.*—There are two kinds of general average loss—*sacrifice* and *expenditure:* the former is any actual damage suffered by one interest for the common safety; the latter is any actual outlay incurred for the same object; and the important distinction between the two is that the former is only contributed for if the rest of the adventure arrives in safety, while the latter is independent of the event of the voyage. The classical definition of general average loss is that given by Lawrence, J. (*Birkley* v. *Presgrave*, 1801, 1 East, 220; 6 R. R. 256, described by Lord Esher, M.R., as "one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate as show that he was one of the greatest mercantile lawyers in this country"): "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo come within general average, and must be borne proportionally by all who are interested." Lord Esher (*Svendsen* v. *Wallace*, 1884, 13 Q. B. D. 69) says that all such phrases as "the benefit of the whole adventure," or "of the whole concern," or "the common adventure," must be restrained to the meaning of the words used by Lawrence, J.; and Bowen, L.J., in the same case distinguishes between the criteria of a common commercial adventure and that of common safety from the sea, and says the latter is the English doctrine (p. 86). (See Arn. 907, *ante.*)

Sacrifices.—First, as regards *ship.* The general rule is that if the ship, or any part of her equipment, is destroyed, damaged, or lost for the general safety, or is applied to some use different from its ordinary use, the loss thence arising is general average, *e.g.* cables cut or anchors slipped to avoid being driven on shore in a gale, or sails let go, or masts cut to right a vessel on her beam-ends (Arn. 928, 931); a ship scuttled, in order to put out a fire on board (*Stewart* v. *West Indies and Pacific S.S. Co.*, 1873, L. R. 8 Q. B. 362), whether the fire be due to spontaneous combustion of cargo or not (see Arn. 936), but no compensation is made for damage done to ship or cargo which has been on fire (York-Antwerp rules, 3). On the other hand, it is not a general average loss if a sacrifice is made in order to avert a peril contemplated by the voyage, and thus within the scope of the shipowner's duties, *e.g.* if in war time the ship fights an enemy's ship, no contribution is made for the expense of curing the wounded, or repairing the damage done by the enemy's fire, or replacing the ammunition expended in the defence of the adventure (*Taylor* v. *Curtis*, 1816, 6 Taun. 608; 16 R. R. 686); or if the ship is strained, owing to carrying a press of sail in order to escape

an enemy or a leakage (*Covington* v. *Roberts*, 1806, Bos. & P. N. R. 378; 9 R. R. 669). Where a ship is voluntarily stranded in order to avoid capture, sinking, or shipwreck, it is doubtful if this is a general average loss or not. According to the older writers, whose opinion is adopted in the American law, this is a general average loss, whether the ship is afterwards saved or not (*Columbian I. C.* v. *Ashby*, 1839, 13 Peters, S. C. 331). Abbott (5th ed., 349, now 771), Arnould (941), both adopt this view, and Carver (388) thinks it likely that it would be so held here. On the other hand, average adjusters here do not allow it (Arn. 938); but Lowndes agrees with the older authorities (3rd ed., 60, now 139, quoted in Carver, 387), and the balance of opinion is thus in favour of admitting it. (So Arnould, 7th ed., 938; and so York-Antwerp rules, 5, but see below.) The question becomes more difficult when a ship is stranded by the voluntary act of the master when she is in a desperate extremity, for if it be inevitable that she must go ashore sooner or later, it seems that it is not a voluntary or a substantial sacrifice to put her ashore at one place instead of another. The American Courts, equally in this case, hold it to be a general average if it be "an intentional stranding, which is under the particular circumstances the direct result of voluntary agency rather than of the action of the elements, and the actual stranding is another than the one impending, and not merely an incidental and inconsiderable modification of it" (Phillips, 1313; Carver, 389; Arn. 938). Carver thinks it probable that "losses by stranding would be held here to be general average, where they are really due to a voluntary act, although done in a hopeless extremity, and that the rule would be the same whether the ship were saved or not" (388), and so Arnould (7th ed., 942). Lowndes will not allow it to be a general average loss where the stranding only anticipates an inevitable grounding in some place (138; and so York-Antwerp rules, 5). The necessity for the sacrifice being substantial (which is perhaps only another way of saying it must be voluntary), is perhaps best illustrated in the case of wreck, whether it be mast, spars, or sails, or cargo, cumbering the ship, and cut or cast away, because it hinders her navigation and endangers the common safety. If such wreck be actual, *i.e.* is in such a state that it must certainly be lost, although the rest of the adventure should be saved without cutting it away, cutting or casting it away, because it is endangering the whole adventure, is not a general average sacrifice. (So York-Antwerp rules, 4.) While, if it is only contingent wreck, and it may be saved, and therefore is of some value, although it is in a peculiarly dangerous position, and actually is a danger to the whole adventure, it will then be a general average loss (Brett, L.J., *Shepherd* v. *Kottgen*, 1877, 2 C. P. D. 578; and *Corry* v. *Coulthard*, *ibid.*, where it was a question of a fallen mast; *Johnson* v. *Chapman*, 1865, 35 L. J. C. P. 23, where a deck-load of timber had got loose in a storm). In this case the thing sacrificed is exposed to a peculiar peril; but if the peril is not peculiar, but is common to the whole adventure, even though the only possibility of safety for the whole adventure lies in sacrificing that one part of it, that will still be a general average. It has been argued in such a case, that as that part must infallibly be lost, it is valueless and is no real sacrifice (Benecke, 170, 183, 219), but the answer to this seems to be that the fact of the common danger menacing the whole adventure puts an equal value on all the interests in it, and it is no reason for the owner of the

sacrificed interest suffering alone, that only its sacrifice will save the rest of the adventure (see Carver, 367-71).

The second kind of general average sacrifice of ship or her equipment, is where it, or any part of it, is put to some extraordinary and more hazardous use, *e.g.* extraordinary consumption of coal by the ship's engines being worked ahead and astern for a considerable time, in order to get her off a mud-bank (*The Bona*, [1895] Prob. 125); spars cut up to make fuel for the donkey-engine of a sailing ship, worked to keep down a leak, the ship having been sufficiently provided in that respect when she sailed (*Harrison* v. *Bank of Australasia*, 1872, L. R. 7 Ex. 39); but if a ship started on the voyage without a reasonably sufficient supply, the shipowner cannot recover in general for the value of the substitutes he has employed (*Robinson* v. *Price*, 1876, 2 Q. B. D. 91); sails or cordage used to stop a leak (Phillips, 1299); cutting the cable of the best bower anchor, and making it fast to a pier to prevent the ship being thrown off by a storm and sunk at the harbour bar (*Birkley* v. *Presgrave*, 1801, 1 East, 220; 6 R. R. 256); or cutting the ship's side open to facilitate jettison of the cargo (*Marsham* v. *Dutrey*, Marshall, 430). Where a ship, under charter with goods shipped for a particular port, on arriving there was ordered to quarantine 120 miles off, and in order to get there had to burn part of the cargo, damage done to the ship thereby was held to be a general average loss for which shippers of goods were bound to contribute (*Walford* v. *Galindez*, 1897, 2 C. C. 137; and see York-Antwerp rules, 6, 7, 9).

Secondly, in the case of *goods*. Sacrifice of goods generally takes the form of *jettison*. Any jettison of goods for the safety of the whole adventure is a general average, except perhaps in the case of deck goods (see below), even of goods for which no bill of lading has been given (Arn. 919, 923). Jettison may be constructive as well as actual, *i.e.* if goods are taken out of the ship and put into boats or lighters, in order to float her when aground or lighten her, this is equivalent to a jettison, and the cost of lightening the ship is general average (York-Antwerp rules, 8); and if such goods are lost before they are put in a place of safety, they are a general average loss, and so are the boats if lost containing them. If in such case the ship and rest of the cargo are lost, the lightened goods will not contribute to their loss; nor will the ship and cargo contribute to the loss of the lightened goods, if these were taken out of the ship for their own benefit, or in the usual course of navigation. Any damage incidental to jettison, done to either the ship or other goods, is general average (Lowndes, 67, so held in the U. S.; *Maggrath* v. *Church*, 1803, 1 Caines, N. Y. 196); so is damage to goods by water being thrown down the ship's hatches, to put out a fire which has arisen in other goods (*Whitecross Wire Co.* v. *Savill*, 1882, 8 Q. B. D. 653), or owing to water going down the hatches while opened for a jettison (Lowndes, 68). American law distinguishes between goods already on fire and other goods damaged by water thrown down to put the fire out, and only allows damage to the latter in general average (*Columbian I. C.* v. *Ashby, ante*). Cargo pumped up is not general average (*Hills* v. *London A. C.*, 1839, 5 Mee. & W. 569). Goods jettisoned are not abandoned, but can be recovered on paying salvage for them. Goods given up to pirates by way of composition are a general average loss (*Hicks* v. *Palington*, Moo. 297), but not if they are forcibly taken by pirates or plunderers (*Nesbitt* v. *Lushington*, 1792, 4 T. R. 783; 2 R. R. 519). A

sale of goods from necessity in a foreign port, in order to raise funds for the adventure, or to replace general average losses, is general average (*Hallett* v. *Wigram*, 1850, 19 L. J. C. P. 281), but not if it be on account of a single interest (*Powell* v. *Gudgeon*, 1816, 5 M. & S. 431), *e.g.* to release the master of the ship arrested for the price of necessary repairs done to her (*Hopper* v. *Burness*, 1 C. P. D. 137, see below, *Dobson* v. *Wilson*, 1813, 3 Camp. N. P. 480; 14 R. R. 817). If such goods are sold for less at their port of refuge than they would have fetched at their destination, *semble* their owner can recover for the larger value (*Richardson* v. *Nourse*). Depreciation in value of cattle owing to ship having been obliged for the common safety to put into a port of refuge whence cattle could not be imported into the country of its destination, and had to be sold elsewhere, is a general average loss (*Anglo-Argentine L. S. and P. A.* v. *Temperley S. C.*, [1899] 2 Q. B. 403).

Thirdly, in the case of *freight*. Freight lost by jettison of goods (Arn. 925, so held in United States; Phillips, 1287), or by voluntary stranding of ship (Phillips, 1302), or by sale of goods for general average purposes (Carver, 433), is a general average loss. But freight lost owing to the master's putting into a port of refuge on account of the cargo heating, and selling it, and justifiably abandoning the voyage, is not a general average loss (*Iredale* v. *China Traders I. C.*, [1899] 2 Q. B. 356; [1900] 2 Q. B. 515). By York-Antwerp rules, damage owing to a sacrifice or a jettison for common safety is general average (2), and so is loss of freight by such damage to or loss of cargo (*ibid.* 15). Charter-party freight, as distinct from bill of lading freight, has been held not to be a subject of contribution (*The Leitrim*, [1902] P. 256, but see Carver, 435).

Expenditures.—The distinction between these and sacrifices is that these give an immediate vested claim to compensation, while sacrifices are only made good subject to the ultimate safety of the adventure. The chief characteristics necessary to make them general average are that they must be made for the common safety, and must be extraordinary in their nature. The following are general average expenses as made for the common safety:—(*a*) Salvage for getting a ship out of a position of peril (*e.g.* capture or shipwreck) is, in practice, considered general average, although in law it is quite distinct from it, and by maritime law all property saved from danger is liable individually for its proportion of the salvage awarded against the whole of the adventure to which it belongs. The best illustration of this is that the Admiralty Court could issue process for salvage, but not general average (*The Cargo ex Galam*, 1863, 32 L. J. Ad. 97). Salvage is, strictly speaking, only general average when the amount is agreed beforehand, and that amount is necessary for the common safety. Thus, money expended by the master in getting a stranded ship afloat for the common benefit of ship and cargo is general average (*Kemp* v. *Halliday*, 1875, L. R. 1 Q. B. 520), although the fact that he has paid what is a reasonable and prudent sum, according to his judgment, does not decide what sum was necessary to extricate the ship and cargo from danger, and the latter fact must be specially proved before that payment can be brought into general average (*Anderson* v. *Ocean S.S. Co.*, 1884, 10 App. Cas. 107). The shipowner can claim in general average remuneration for arranging the salvage operations of the whole adventure, in the absence of any express contract to that effect between himself and the shippers (*Schuster* v. *Fletcher*, 1878, 3 Q. B. D. 418, overruled as to the general principle

by *Rose* v. *Bank of Australasia*, [1894] A. C. 687). Unless the safety of both ship and cargo be in peril, no expenditure can be general average; thus, if the safety of the ship be hopeless, or the cargo have been taken out of the ship for its own safety, expenditure made with the object of getting the ship into a safe position is not general average (*Royal Mail Steamship Co.* v. *English Bank of Rio de Janeiro*, 1887, 19 Q. B. D. 362), and in neither case does the cargo contribute anything; for taking out the cargo will make no difference to the ship, nor will heaving off the ship affect the cargo. The practice of adjusters here, however, is to make the ship contribute to the cargo, if she is successfully floated. If a ship is accidentally stranded, the expenses of discharging the cargo, reloading it, and resuming the voyage, are, in practice, brought into general average (see York-Antwerp rules, 8); but if lightening her of the cargo does not make her float, the expense incident to other means of getting her off falls on her only (*Job* v. *Langton*, 1856, 6 El. & Bl. 779; *Walthew* v. *Mavrojani*, 1870, L. R. 5 Ex. 116); put shortly, it is only if the discharge of the cargo and getting the ship off are all one continuous operation for the common safety that the expenditure is general average (*The Copenhagen*, 1799, 1 Rob. C. 289; *Moran* v. *Jones*, 1857, 7 El. & Bl. 523, though this latter case has been doubted on the facts in *Svendsen* v. *Wallace, ante*; *Hall* v. *Janson*, 1854, 4 El. & Bl. 500).

(*b*) Another general average expenditure is payment of ransom to pirates or plunderers, or a compromise between belligerents and neutrals, but not ransom to public enemies (Phillips, 1335-7; Arn. 925), except as allowed by the Prize Act, 1864, s. 45.

(*c*) So is money raised abroad for general average purposes, with all its incidental expenses, such as exchange, interest, etc. (Phillips, 1357; see Arn. 965).

(*d*) Port of refuge expenses are in some cases general average. When a ship is obliged, for the general safety, by damage caused by sea perils, to put into port to repair, the expense of putting into port and landing the cargo are general average (*Svendsen* v. *Wallace*, 1885, 10 App. Cas. 404); but the expense of warehousing the cargo falls on the cargo, and that of reloading the cargo and leaving the port on the freight. On the other hand, when the ship is obliged to do so in order to repair a general average loss, all the above expenses are general average (*Atwood* v. *Sellar*, 1870, 5 Q. B. D. 286), and damage incurred by cargo in discharging is general average where such discharge is general average, and *vice versâ* (York-Antwerp rules, 12). The expense of repairing, in the former case, is particular average on the ship, while in the latter it is general average (*Plummer* v. *Wildman*, 1815, 3 M. & S. 482; 16 R. R. 334; *Power* v. *Whitmore*, 1815, 4 M. & S. 141; 16 R. R. 416). The expense of cutting a way through ice to sea out of the loading port, where the ship had to go for necessary repairs required by the ship's unseaworthiness, is not a general average expense (*Westoll* v. *Carter*, 1898, 3 C. C. 112). As to port of refuge expenses generally, see York-Antwerp rules, 10; Arnould, 7th ed., 945-963; Lowndes, ch. 5; Carver, 402-414.

The necessity for the expenditure being extraordinary is illustrated by the following instances:—Wages and provisions for the crew during repairs are neither general nor particular average (*De Vaux* v. *Salvador*, 1836, 4 Ad. & E. 420; *Anglo-Argentine L. S. and P. A.* v. *Temperley S. C.*, 1899, 2 Q. B. 403, *ante*), though they are by York-Antwerp rules where repairs are general average (r. 11); and see Carver, 405. Thus under a

time charter "general average according to York-Antwerp rules," where bill of lading holders, under similar bills of lading, paid contributions to the ship for wages and provisions during detention in a port of refuge, under circumstances in which the charter-party hire ran on, charterers could not recover from shipowners (*Howden* v. *S.S. Nutfield Co.*, 1898, 3 C. C. 56; and see *M'Call* v. *Houlder*, 1897, 8 Asp. 252). Wages and provisions during detention by capture, or embargo, or any other *vis major* are not general average (*Robertson* v. *Ewer*, 1785, 1 T. R. 127; 1 R. R. 164; *Sharp* v. *Gladstone*, 1805, 7 East, 24; 8 R. R. 583). Expenses owing to detention are not general average, whether due to waiting for convoy, unless the danger is so imminent that they are necessary for the general safety, or to quarantine, or to ship being frozen up in the ordinary course of the voyage (Arn. 961).

Expenditure may be extraordinary in its amount and yet not in its nature, and so not general average, *e.g.* an expenditure of £1400 on coals to work the auxiliary screw of a sailing ship damaged by an iceberg, and unable to sail on her voyage home from the West Indies, in itself gives no claim to contribution, though thereby the general average of making a port of refuge, and keeping the cargo there for repairs, was avoided (*Wilson* v. *Bank of Victoria*, 1867, L. R. 2 Q. B. 203). Hire of extra hands to pump a ship after springing a leak is general average (*Birkley* v. *Presgrave*, *ante*), but not hire of extra hands in place of deserters from the crew (*Plummer* v. *Wildman*, *ante*), nor gratuities promised to seamen in time of danger to induce them to do their duty (*Harris* v. *Watson*, 1790, 2 Pea. 102; 3 R. R. 654; *Harris* v. *Carter*, 1854, 3 El. & Bl. 559). But if it will be actually dangerous for the ship to go to sea shorthanded, extra pay to the crew on board is general average (*Hartley* v. *Ponsonby*, 1857, 7 El. & Bl. 872).

4. *Contribution to General Average Losses.*—The general rule is, that sacrifices or expenditures made for the preservation of the whole adventure, *i.e.* ship freight and cargo, are made good to the owner of the interest sustaining the loss by a contribution levied on the whole adventure. There are two exceptions to this general rule, which are concisely stated by Lord Watson in delivering the judgment of the Privy Council in *Strang, Steel & Co.* v. *Scott*, *ante*. The facts of that case were that a ship had been stranded owing to the negligence of the master, and for the general safety it became necessary to jettison part of the cargo, and the judgment allowed the owners of the jettisoned cargo to recover general average contribution for its loss, but not the shipowner for the damage done by the jettison to the ship. "There are two well-established exceptions to the rule of contribution for general average. When a person who would otherwise have been entitled to claim a contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property (*Schloss* v. *Heriot*, 1863, 14 C. B. N. S. 59), unless the contract under which the goods are being carried excepts his negligence (now see *The Carron Park*, 1890, 15 P. D. 203; *Milburn* v. *Jamaica F. I. and T. C. of London*, [1900] 2 Q. B. 541, *ante*; and see generally Arn. 918, 923; and Carver, 373*a*-373*c*, who differs from the view adopted in these cases, as the United States Supreme Court has done, *ibid.*; and see Antwerp Rule of 1903 *Int. Law Ass.*, Antwerp, 231, Report). The second exception is in the

case of deck cargo. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded in a question with the other shippers of cargo as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon the deck; and the exception does not apply either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted; or (2) in any case where the other owners of cargo have consented that the goods jettisoned shall be carried on the deck of the ship." In these latter cases jettison of deck cargo is a general average; thus in *Gould* v. *Oliver*, 1840, 2 Sco. N. R. 152, a deck-load of timber carried by consent of shipowner, and jettisoned, was contributed for by shipowner to goods owner; in *Hurley* v. *Milward*, 1839, 1 Jones & C. 24, jettison of pigs carried by custom of the Irish trade on deck, was contributed to by shipowner; *Johnson* v. *Chapman*, *ante*, jettison of deck-load of deals carried in a chartered ship was contributed to by shipowner; *Wright* v. *Marwood*, *ante*, jettison of cattle carried on deck under a bill of lading exempting the shipowner from liability for any accident or injury of any kind or nature whatsoever, was held not to be a general average loss to which shipowner and shipper below deck must contribute; and in *Burton* v. *English*, *ante*, it was held that a charter-party stipulating that "the ship shall be provided with a deck-load if required, at full freight, but at merchant's risk," did not exclude the right of the charterer to contribution from the shipowner to jettison of deck cargo which was carried by the custom of trade. The United States apply the general rule strictly, and allow no exception in favour of local or trade usage, but Phillips' opinion is that the better doctrine is to allow the exceptions of usage or notice (Phillips, 1282). On the other hand, a usage not to contribute to jettison of deck cargo, though allowed, has been held to be valid (*Miller* v. *Titherington*, 1861, 30 L. J. Ex. 217). See generally *De Hart* v. *Compania Ananima Seguros Aurora*, [1903] 1 K. B. 109; York-Antwerp rules, 1; Arn. 920-923; Carver, 379-381.

5. *What Contributes to General Average.*

The general rule is that "all that is ultimately saved out of the adventure contributes to make good the general average loss, provided it was actually at risk at the time and under the circumstances in which the loss was incurred" (Arn. 970). "Whatever is eventually saved must contribute for what has been purposely sacrificed" (Phillips, 1318); but this applies only to property saved, and not life (Carver, 420). Thus, goods landed before a jettison, or landed after a jettison, do not contribute; in case of successive jettisons, the goods jettisoned are for the purpose of contribution supposed to continue on board, and therefore contribute to later jettisons on the same voyage (Arn. 971). And generally any interest which is not at risk at the time of the general average loss will not contribute to it. The owner of the interest suffering the loss contributes to his own general average loss no less than those of the saved interests; thus, goods which have been sold for the common safety contribute, and so does the freight of goods jettisoned or sold (*Hill* v. *Wilson*, 1879, 4 C. P. D. 329; Carver, 416).

The following interests on board contribute:—"All merchandise put on board for the purpose of traffic" (Park, J., *Brown* v. *Stapylton*, 1827, 4 Bing. 119); deck cargo, though it is not always contributed for; goods belonging to Government by practice of adjusters (so held in United States: *U. S.* v. *Wilder*, 1838, 3 Sumner, 308); gold, silver, jewels and precious stones, not attached to the persons of the passengers. On the other hand, the following do not contribute:—Wearing apparel and ornaments and jewels, and money attached to the person; perhaps bank-notes (Phillips, 1397); passengers' luggage (so York-Antwerp rules, 17); seamen's wages; provisions, whether for passengers or crew (*Brown* v. *Stapylton, supra*, where provisions shipped for the use of a cargo of convicts were held free from contribution), for they contribute under ship, or passage-money, or freight; though Phillips and Arnould both think that provisions for the use of passengers or animals should contribute, but not if the latter are going to a market, for their value reappears (Arn. 972; Phillips, 1399; and see generally, Arn., 7th ed., 970-973; Lowndes, 324, 325).

6. *The Principle and Amount of Contribution.*—The general principle is thus stated:—"The loss to the individual whose goods are sacrificed for the benefit of the rest is to be compensated, according to the loss sustained on the one hand, and the benefit derived on the other" (Bovill, C.J., *Fletcher* v. *Alexander*, 1868, L. R. 3 C. P. 382), or, as more fully expressed, "The party whose property has been sacrificed, or his money disbursed, or his credit pledged for the general benefit, must be placed exactly in the position in which he would have stood if the sacrifice had been made not by himself but by one of his co-adventurers" (Arn. 974). He is bound equally with his co-adventurers to contribute towards his own loss: thus, in case of a sacrifice, for the purposes of adjustment the property sacrificed is treated as if it had remained on board the ship; in the case of expenditure, his rateable share of it is deducted from the contribution paid to him (Carver, 417).

It has already been pointed out that a general average sacrifice only gives a right to contribution if the ship and cargo eventually arrive safe; whereas an expenditure is contributed for, whatever be the event of the voyage. It may thus be important to determine whether a general average loss is a sacrifice or an expenditure, *e.g.* where goods are sold for general average purposes in a port of distress. The opinions here and in the United States are conflicting (Arn. 6th, p. 894; Carver, 428; Phillips, 1363; Kent, iii. 212-214), and there is no direct decision on this point, though in practice adjusters do not distinguish between sacrifices and expenditures as the cause of contribution (Arn. 977); but there have been decisions that if goods are sold for the purpose of getting the ship repaired in a port of distress (*i.e.* for a particular interest, the ship), the value is to be reimbursed to their owner, whether the ship arrive in safety at her destination or not. If she does not arrive, their value to be made good is their net value at the port of distress (*Powell* v. *Gudgeon*, 1816, 5 M. & S. 431; 17 R. R. 385; *Atkinson* v. *Stephens*, 1852, 7 Ex. Rep. 567). If she does arrive, the goods must be contributed for either at the net value which they would have had at their destination, or at the value for which they sold at the port of distress, their owner being able to choose whichever is the higher value. And if the sale was for general average purposes, their owner can recover that higher value in general average (*Richardson* v. *Nourse*, 1819, 3 Barn. & Ald. 237; 22

R. R. 368). Analogy from these cases favours treating a sale of goods for general purposes as an expenditure, being "a forced loan from the shipper to the shipowner" (Brett, J., *Hopper* v. *Burness*, 1876, 1 C. P. D. 137, and see generally, Arn. 976-978; Lowndes, 279-284). Where the ship perishes by the peril to avoid which the sacrifice was made, but the goods are saved, there is a difference of opinion and practice whether the part saved contributes for that sacrificed, but the right to contribution is favoured by the balance of opinion (Arn. 979); where the ship is saved at the time but ultimately perishes, all that is saved from the wreck contributes (*ibid.* 980).

The amount of contribution may be very different, according as the general average loss is a sacrifice or an expenditure. In the former case, the right to contribution arises only at the termination of the voyage, for the property sacrificed is regarded as though it were still at risk, and formed part of the whole adventure on which the contribution is assured at adjustment; in the latter case, the right to contribution arises at once, and is independent of whether the adventure arrives safely or not; and any expenditure made by the shipowner, either from his own funds or by loan from somebody else, must be fully reimbursed, whatever the result of the voyage (see Lowndes, 259-271). Accordingly, it is only in cases of sacrifice that it is doubtful what compensation is due for the loss, for the amount remains in uncertainty till the end of the voyage.

In the case of a general average sacrifice, either of ship or ship's material, the loss actually sustained must be made good to the shipowner. If the ship be totally lost, the amount of contribution is her value to her owner at the time she was lost, as if she were then in safety (so held in U. S.: *Columbian I. C.* v. *Ashby, ante*); and if she become a constructive total loss (*i.e.* not worth repair), owing to the general average sacrifice, the amount of compensation due for her is her value, prior to the sacrifice, minus her salvage at the port of refuge. Thus, where a ship, after being much damaged by sea perils, and laid on her beam-ends in a storm, had her masts cut away in order to right her, and on arriving at a port of refuge was sold, as not worth repair, for £880, and her value before the general average sacrifice was estimated at £6000, and the estimated cost of repairing her after it was £9000, of which £3000 was due to particular average, the Court of Appeal held, confirming Mathew, J., that the value of the ship to be contributed to the general average was that proportion of her value before the general average loss which the cost of the general average repairs bore to the particular average repairs, namely, two-thirds of £6000, minus the £880 salvage (*Henderson* v. *Shankland*, [1896] 1 Q. B. 525). Where the sacrifice is of ship's material, the amount to be contributed to is the actual cost of repair, deducting one-third new for old; if the ship is of wood, and is on her first voyage, at the place where the repairs are done; if no repairs are done, then it is the estimated cost of making good the loss at the place where the voyage ends (see Lowndes, 297; Carver, 421; and see York-Antwerp rules, 13). This deduction of one third "new for old" is not made from the cost of temporary repairs of general average damage (*ibid.* 14); in policies of insurance it is generally excluded, and in adjustments it is only followed in the case of wooden ships (Carver, 422).

In the case of freight, the amount of contribution is its net amount payable to the shipowner; thus, in a case of jettison, the freight payable on arrival of the jettisoned goods is to be contributed for (Lowndes, 293),

and so it is if the ship is totally disabled, *e.g.* by voluntary stranding (*Columbian I. C.* v. *Ashby, ante*). If, in this latter case, the goods can be sent on, the freight payable to the substituted ship must be deducted from the freight for contribution (*Kidston* v. *Empire M. I. C.*, 1867, L. R. 1 C. P. 535); and if the earning of freight does not depend on the arrival of particular goods on board a particular ship, the freight of a substituted cargo reduces the claim for freight of the jettisoned goods (Lowndes, 295). According to Phillips, freight of jettisoned goods is contributed for at its gross amount (1368). Where there are two freights being earned on board a ship, namely, under charter-party and under bill of lading, it seems that the shipowner can only claim on the latter. The practice of average adjusters not to allow contribution for charter-party freight, though the loss is caused by general average sacrifice, has been recognised by the Court (*The Leitrim*, 1902, 87 L. T. 240, 8 C. C. 8; and generally as to contribution by and to freight, see Carver, 433-441).

In the case of cargo, the amount of contribution is the net market value it has at the port of discharge, *i.e.* the price it fetches, deducting freight, landing, and sale charges (Lowndes, 291; Carver, 419; Arn. 981). If the jettison is made so early in the voyage that the adjustment is made at the port of departure, the value to be made good is the cost price of the goods on board, *i.e.* including shipping charges but not insurance premiums (Phillips, 1362, 5). By York-Antwerp rules the market value of the goods sacrificed or damaged at the date of the arrival of the vessel, or at the termination of the adventure, is the value to be made good (16). Where the jettisoned goods, if they had remained on board, would, like the rest of the cargo, have arrived in a damaged condition, their value is the net value for which they would have sold in a damaged state (*Fletcher* v. *Alexander, ante*); and, similarly, any leakage or breakage which would have affected them should be allowed for. In practice, however, the rule is difficult to apply, and when the goods are sound at the time of jettison, and the cargo arrives partly sound and partly damaged, the loss of the jettisoned goods is contributed for at their sound value (Lowndes, 293). The amount of damage caused by jettison to ship or goods is the difference between their net damaged proceeds and what their sound proceeds would have been. If jettisoned goods are recovered before adjustment, their loss is the damage done by the jettison and the expense of recovering them; if, after adjustment, any excess of the contribution paid over that loss is repaid (Arn. 981). If valuables are jettisoned, which are not described at their proper value, they are contributed for only at their declared value; if no declaration of their value be made, and this be due to fraud (and perhaps negligence) on the part of the shipper, the value to be contributed for is only that of such goods as the master might reasonably suppose them to be (Phillips, 1372; *Lebeau* v. *Gen. Steam N. C.*, 1872, L. R. 8 C. P. 88). Goods sold for general average purposes, as noticed above, are contributed for either at their value at the port of refuge, or the value they would have had at the port of destination, certainly if the ship arrives, and perhaps if she does not.

The Apportionment of the Contribution.—The value of the various interests for making contribution corresponds generally with their value for receiving contributions: "the basis for contribution for property saved is the same as the basis of allowance for property sacrificed" (Lowndes, 304; Carver, 418); and indeed this seems to follow from the

principle governing general average sacrifices, namely, that the thing sacrificed is treated as forming part of the adventure till the voyage is ended. Phillips (136), however, seems to intimate an opinion that the two values need not be the same, and that in the case of ship and freight the gross value at the time of the loss is the amount to be made good to them. Generally, the contributory value of the different interests is their value to the owner at the time and place at which the liability of the parties to the adventure is definitely determined (see Arn. 983). In principle, from what has been already said, it is clear that the time and place of determining the liability is different in the case of an expenditure from what it is in the case of a sacrifice, and contribution becomes due the moment the outlay is made, so that the various interests should contribute on their values at that moment, without regard to any partial or total loss which may befall them before the end of the voyage (Phillips, 1374; see Lowndes, 259); while in the case of sacrifice the interests contribute on their net value, as they actually come to their owner's hands at the end of the voyage (Arn. 983). The practice is, however, to adjust the contributions to both kinds of loss on the net saved value of the interests; and Carver supports it (428). By York-Antwerp rules the basis for contribution is the actual values of the property at the termination of the adventure, adding the amount made good as general average for property sacrificed, with deduction from shipowner's freight and passage-money at risk of such port charges and crews' wages as would not have been incurred had the ship and cargo been totally lost at the date of the general act or sacrifice, and have not been allowed as general average; deductions being also made from the value of the property of all charges incurred in respect thereof, subsequently to the general average act, except such charges as are allowed in general average (17).

The contributory value of a *ship* is her worth to her owners at the time and place of adjustment; that will generally be the market value of such a ship in an ordinary employment (*Grainger* v. *Martin*, 1860, 2 B. & S. 456; Lowndes, 305; Hopkins, 143); but if she is designed for, or engaged in, a particular trade, some different measure, such as her cost price, less deterioration, may be adopted (*African S.S. Co.* v. *Swanzy*, 1856, 25 L. J. Ch. 870). She will then contribute according to the condition in which she arrives at the end of the voyage, before any repairs are done to her (Carver, 423). There is no fixed rule for determining her value, but one way is to ascertain her value when she sailed, and deduct from it the provisions and stores expended, the wear and tear of the voyage, and any partial losses suffered, or contributions due from her in general average; while the value of the thing sacrificed, if it belongs to the ship, and also any general average contribution due to her, must be added to it (Phillips, 1380; Lowndes, 307).

The contributory value of *freight* is the amount of freight eventually saved. Some freight, therefore, must be pending at the time of sacrifice, or it will not contribute at all (*Cox* v. *May*, 1815, 4 M. & S. 152; 16 R. R. 422); thus, if the cargo has been delivered before the loss takes place, and the freight is thus earned, it does not contribute, because it is not at risk. For the same reason, advance freight (which is not to be repaid in any event) does not contribute as freight in the hands of the shipowner, though it does in the hands of the shipper, as part of the value of his goods (*Trayes* v. *Worms*, 1865, 34 L. J. C. P. 374). If only *pro*

rata freight be pending, that will contribute (*Maggrath* v. *Church*, U. S., *ante*). The amount of freight pending will depend on the charter or bill of lading under which the goods were shipped; and it has been held that if a ship be chartered for a voyage out and home, at one entire sum, which is to be paid on her safe arrival at the home port, and a general average loss happens on the outward voyage, the entire freight contributes (*Williams* v. *London Assurance Co.*, 1813, 1 M. & S. 318; 14 R. R. 441). Where a ship under charter to go to a foreign port, load cargo and bring it home, freight to be paid on delivery of cargo, while going in ballast to her loading port, grounded, and by a general average sacrifice was enabled to continue her voyage, and loaded and delivered cargo and received freight, it was held that the charter-party freight must contribute (*S.S. Carisbrook Co.* v. *London and Provincial M. and G. I. C.*, [1901] 2 K. B. 861; [1902] 2 K. B. 681). If the freight be apportioned by the charter-party, probably only the freight accruing on the passage during which the loss occurs, contributes, and *à fortiori* this will be so if the passages are separate voyages (Arn. 986). This has been so held in the United States (*Spafford* v. *Dodge*, 1817, 14 Mass. 66). Where the ship is chartered for subsequent voyages, unless they have a peculiar value for the shipowner, the freight to be earned on them will not contribute to loss on a previous voyage (Carver, 439). Where there is both a chartered and a bill of lading freight pending on the voyage, it has been held that the latter determines the contributory value of the freight (*The Leitrim*, [1902] P. 256, *contra* Carver, 435; see Arn. 987, 988, and *ante*, p. 658; and see Lowndes, 309).

The freight, if contributory, contributes on its net value, which is ascertained by deducting from the gross freight the wages of master and crew accruing after the loss, but without taking provisions into account (Arn. 989; Lowndes, 322). It will not contribute at all if it be swallowed up by wages of the crew during detention at sea by weather or in port by embargo; nor if the ship be disabled either before or after the general average loss, and the cargo is transhipped at an expense equal to, or greater than, the original freight, while if the substituted freight be less, only the difference between it and the original freight contributes (Phillips, 1388, 9). All contributions to general average, and other losses and expenditures falling on the freight subsequent to the general average loss, are deducted (1391). The freight on goods lost by a voluntary stranding, as well as freight lost on the goods saved, contribute to it (Carver, 434).

The contributory value of *goods* is the same as the value to be made good to them by contribution, *i.e.* their market price at the end of the voyage, less freight, landing, and sale charges, and consequent depreciation in value (*Anglo-Argentine* v. *Temperley*, [1899] 2 Q. B. 403; Phillips, 1394; Lowndes, 307; Carver, 419). If the loss is a jettison (or sale, if that be a sacrifice, see *ante*), the value of the goods lost must be added to that of the goods saved. If the goods saved arrive in a damaged condition, they contribute on their damaged value, unless the damage is due to the act of sacrifice, when they will contribute on their sound value, for the contribution due to them makes up the difference to them (*Fletcher* v. *Alexander*, *ante;* Arn. 990). In practice, goods are not allowed to have successive values, though several general averages happen on the same voyage.

8. *Adjustment of General Average.*—The place of general average adjustment is generally the place where the voyage actually ends, whether that be the contemplated destination or not, and the law and custom of the country to which the port of destination belongs decide the method of adjustment. "The adjustment must be made at the port of destination, if it be reached; but if the voyage is interrupted by some supervening cause, which necessitates or justifies its termination at some intermediate place, that place is the proper place of adjustment" (Cockburn, C.J., Ex. Ch., *Mavro* v. *Ocean M. I. C.*, 1875, L. R. 10 C. P. 414; Carver, 416, 424-427; Arn., 7th ed., 992-1003 generally). When that port is a foreign one, the adjustment is called a foreign adjustment. An average bond executed at the port of discharge, providing that "consignees of cargo shall furnish shipowners with correct account and particulars of value of goods delivered, in order that the amount of average contribution may be ascertained and adjusted in the usual manner, does not imply an obligation on the shipowner to employ an average stater at the port of discharge, for he may make his own average statement (*Wavertree Sailing Ship Co.* v. *Love*, [1897] A. C. 373). By York-Antwerp rules the adjustment is governed by the law and practice which would have governed it apart from the rules (18). If the voyage is broken up by sea perils, and the cargo is discharged at an intermediate port, or even the port of departure, the adjustment is made there on the values of the different interests at that time (*Fletcher* v. *Alexander*, *ante*). But if the voyage is terminated not by necessity at a port other than the port of destination, an adjustment made there is not binding unless all the parties expressly assent to it (*Hill* v. *Wilson*, 1879, 4 C. P. D. 329). Although by the law of the place of adjustment certain expenses may be allowed in general average, which would not be so included here, the parties to the adventure are nevertheless bound by the adjustment (*Simmonds* v. *White*, 1824, 2 Barn. & Cress. 805, a Russian adjustment; so *Dalgleish* v. *Davidson*, 1824, 5 D. & R. 6; *Newman* v. *Cazalet*, Park, 630, Pisan adjustment; *Walpole* v. *Ewer*, *ante*, Danish adjustment); *à fortiori*, if express provision is made by the contract of sea-carriage, that general average shall be determined according to a particular law or set of rules, *e.g.* general average to be adjusted "according to York-Antwerp rules," or "*per* foreign statement" (*The Mary Thomas*, [1894] P. 108, "on Dutch terms"; *Hendricks* v. *Australasian I. C.*, 1874, L. R. 9 C. P. 460). Where in a policy it was provided that general average was to be according to foreign statement, items may be included which are allowed by charter-party between the parties, although they would not be included by the foreign law (*De Hart's Case*, *ante*, [1903] 1 K. B. 109).

The persons liable to pay the general contributions found due are the owners of the interests upon which they have been apportioned. The shipowner has a lien on the goods for their contributions, whether on his own account or that of other shippers, which it is the duty of the master to enforce (see *Nobel's Explosives Co.* v. *Rea*, 1897, 2 C. C. 292), and he is liable to the persons entitled to contribution if he delivers the cargo to its different owners without security for the payments due from it (*Crooks* v. *Allan*, 1879, *ante*; *Strang, Steel & Co.* v. *Scott*, 1889, *ante*). In the case of a general ship, the master generally takes a bond from the different consignees before delivering the cargo, but such bond must be reasonable in its terms, or it may be refused enforcement (*Huth* v.

Lamport, 1886, 16 Q. B. D. 442, 735). This lien is possessory only, and, if lost, the master may sue for the contributions (*Anderson* v. *Ocean S.S. Co.*, *ante*); in the Admiralty Court no action lay for general average contributions unless the ship was under the arrest of the Court for some other claim (*Cargo ex Galam*, 1863, *ante*). If, however, the consignee of goods is not their owner, he is not liable for general average contributions due upon them, though he has notice of the liability when he takes delivery of the goods (*Scaife* v. *Tobin*, 1832, 3 Barn. & Adol. 523); but if he does so under circumstances from which a promise to pay the contribution can be inferred, he will be liable (*Hingston* v. *Wendt*, 1876, 1 Q. B. D. 367). If a consignee becomes an owner only after the general average loss occurred, it seems he will not be liable (*Scaife* v. *Tobin*, *ante*); but in practice the person liable is generally the insurer of the goods, the policy being transferred with the goods (Carver, 443). A goods owner entitled to contribution can sue the shipowner or the other shippers, but he has no lien which he can enforce on the ship and cargo, unless they are already under Admiralty arrest, except by counter claim (*The Oquendo*, 1878, 38 L. T. 151; and see Arn. 1004).

9. *Relation of General Average to Insurance.*—General average, though in practice closely associated with insurance, is quite independent of it both in origin and principle, for it has been defined as "a consequence of the perils of the sea, first imposed by the Rhodian law many centuries before insurance was known at all, just as salvage is imposed by the maritime law, not so early, but at least long before any policies of insurance in the present form were thought of" (Lord Blackburn, *Aitchison* v. *Lohre*, 1879, 4 App. Cas. 765). But where the interests forming a maritime adventure are insured, general average losses and contributions are considered to be caused by perils of the sea, and thus were within the policy (*Hall* v. *Janson*, 1856, 4 El. & Bl. 500). Jettison is expressly insured against in the ordinary Lloyd's policy, and in that case the assured whose goods have been jettisoned need not wait to recover contribution from the other interests, but can at once recover the value of the goods from his underwriter, and the latter on making payment is subrogated to the rights of the assured (*i.e.* has them transferred to him), and can recover contribution for the loss (*Dickenson* v. *Jardine*, 1868, L. R. 3 C. P. 639; Phillips, 1348). Lowndes would extend this rule to all general average sacrifices (3rd, 227). Any contributions payable under an adjustment are reimbursed by the underwriter to the assured, provided that the adjustment is a binding one on the parties (*i.e.* made at the proper place), and that its terms are warranted by the law of the country where it is made (*Newman* v. *Cazalet*, *ante*; *Power* v. *Whitmore*, *ante*). If there is no stipulation in the policy to pay general average, according to foreign adjustment or particular rules, the underwriter is only liable to pay general average proximately due to perils insured against in the policy; if there is such a stipulation, he must pay whatever is general average by that statement or those rules, whether it was caused by a peril insured against or not (*Harris* v. *Scaramanga*, 1872, L. R. 7 C. P. 481; *Greer* v. *Poole*, 1880, 5 Q. B. D. 272).

The assured will recover from the underwriter, in respect of general average losses, that proportion of the loss which the sum insured by the policy bears to the insurable value of the property; and in respect of general average contributions, that proportion of the contribution which

the insurable value of the property bears to its contributory value; for the former and not the latter value is the only basis of reimbursement between the assured and the underwriter. Whatever is paid in contribution in excess of the contributory value, over the value in the policy, is paid by the assured, but for whatever is paid on the contributory value not exceeding the value in the policy, the assured is indemnified on the proportion insured (Arn. 1005, quoting Magens, 245). But if the underwriter engages to pay general average on foreign adjustment, he must reimburse on the same basis as that on which the contributories have been compelled to pay under a foreign adjustment (Barnes, J., *The Brigella*, [1893] Prob. 200). Where all the interests concerned in the voyage are owned by the same person, a loss incurred for the common safety gives no right to contribution, for the owner would be contributing to himself. But if those interests are separately insured, the underwriter on one interest can recover contribution from the underwriters on the other interests (*Oppenheim* v. *Fry*, 1863, 38 L. T. 387; *Montgomery* v. *Mutual M. I. C.*, [1901] 1 K. B. 147; Carver, 374*c*). See MARINE INSURANCE.

Particular Average has been already defined above. It is used in two senses—(*a*) As between one party to a maritime adventure and the others; (*b*) As between that party and his underwriter. In the first sense, it means any loss sustained by any one interest, whether arising from a danger peculiar to itself, or from one common to the whole adventure which lies where it has fallen (Carver, 361), or a "loss borne wholly by the party upon whose property it takes place, so called in distinction from a general average for which divers parties contribute" (Phillips, 1422). In the second sense, it is any partial loss to the interest insured, caused by perils insured against in the policy. The latter sense is not considered here, as it will be found under MARINE INSURANCE. It is enough here to say that the two senses are not co-extensive, and a loss may be a particular average, so far as the suffering interest is related to the whole adventure, which is not a particular average loss recoverable from the underwriter who has insured that interest, *e.g.* wages and provisions for ship's crew during detention for repairs and embargo (*Robertson* v. *Ewer*, *ante*).

Phillips gives the following instances of particular average losses:—Masts sprung or carried away; vessel damaged by getting ashore, or being strained through stress of weather; accidental stranding; collision; capture; repairing or replacing damaged parts of ship (1424-5), and so deck goods washed overboard; goods heating from inherent vice.

The term *average* is also used in connection with fire insurance; if a fire policy is declared subject to average, the meaning is that if the property covered at the time of fire exceeds the sum insured, the assured will only receive the proportion of the loss which the insurance bears to the value of the goods (Porter, *Insurance*, 235). By analogy to the rule of general average in marine insurance, where houses are pulled down or blown up in order to check a fire, the loss caused is part of the damage caused by the fire for which the insurer must pay. In London, all damage done by the Fire Brigade in putting out fire is "damage by fire" within a policy of insurance (*ibid.* 117; see Phillips, 1098).

[See Arnould, *Marine Insurance*, 7th ed. (1901); Abbott, *Shipping*, 14th ed. (1901); Lowndes, *General Average*, 4th ed. (1888); Phillips,

Marine Insurance, 5th ed. (1867); Carver, *Carriage by Sea*, 4th ed. (1905); Hopkins, *Average*, 4th ed. (1884); Porter, *Insurance*, 4th ed. (1904); Kent, *Comm.* iii. s. 232ff.; Marshall, *Marine Insurance*, Shee, 4th ed. (1861); Ulrich, *Grosse Haverei*, Berlin (1905); Lees, *Shipping and Insurance*, 11th ed. (1896); Benecke, *Marine Insurance* (1824); Park, *Marine Insurance*, 7th ed. (1817). The references are to the last edition except where otherwise stated, and to sections in Arnould, Phillips, and Carver.]

Averments.—See INDICTMENT.

Avoidance, Plea in Confession and.—See PLEADING.

Avowry.—An avowry is the pleading in defence in the action of replevin (see REPLEVIN). The defendant *avows*, or acknowledges, the taking of the distress (*q.v.*), and alleges reasons why it was legal. Stat. 11 Geo. II. c. 19, s. 22, 1738, enabled defendants in replevin to avow generally that the plaintiff enjoyed the property whereon the distress was made, under a certain rent, and that the rent was then due, without showing the lessor's title.

Award.—See ARBITRATION.

Award (International).—See ARBITRATION (INTERNATIONAL).

Away-going Crops.—See TENANT RIGHT.

"B" List.—See COMPANY.

Baby Farming.—See INFANT LIFE PROTECTION.

Back-Freight.—This is the freight payable by the owner of goods which cannot be delivered at their destination owing to causes for which the shipowner is not responsible, and are consequently carried back by the ship to the place from which they were shipped, or some other suitable place, if their owner gives no instructions to the ship with regard to them, and neither receives them nor arranges about their reception. The master, in such a case, becomes an agent of necessity for the goods' owner; and if taking the goods back seems to him, in the exercise of a prudent judgment, and actually is the best course to adopt for their interest, he is justified in doing so, and the goods' owner must pay freight for the return voyage, which is called return or back-freight (*Cargo ex Argos*, 1873, L. R. 5 P. C. 134). The shipowner, however, is not entitled to back-freight if the voyage on which the goods are sent is an illegal one to his knowledge (*Hemp* v. *Jones*, 1787, 2 Chit. 550).

[Scrutton, *Charter-Parties*, 2nd edit. (1903); Stroud, *Jud. Dict.*]

Backing Warrants.—See ARREST.

Bagatelle.—See BILLIARDS.

Bahamas, the most northerly of the British West Indian colonies, is a long chain of islands, of which about twenty are inhabited. The laws of the colony are English in their origin, and the common law of England, unless where altered by statute or manifestly unsuited to local conditions, is in force (40 Geo. III. c. 2, preamble, *Jour. Comp. Leg.* 1899, p. 296). See PRIVY COUNCIL as to conditions of appeal.

Bail (*ballium*).—A person is said to be admitted to bail when he is released from the custody of officers of the law, and entrusted to the private custody of persons, called his bail, who become bound as sureties to produce him to answer, according to law, to the charge or claim, at a specified date or place (1 Hale, P. C. 96). In old records, when the accused could not find bail, an entry is found, "Let the prison be his bail."

Bail differs from MAINPRISE (*q.v.*), in that the sureties, having the custody of their principal, if they think he means to flee from justice, may arrest him and take him before a justice, and surrender him in their own discharge (*Bond* v. *Isaac*, 1757, 1 Burr. 339; *Capron* v. *Archer*, 1757, 1 Burr. 340), or may apply to a justice for a warrant for his arrest. When the principal is surrendered or the warrant is executed they are discharged (Hawk., P. C., bk. ii. c. 15, s. 3). The obligation of the sureties is created by bond executed, or recognisance acknowledged, by them. In Crown cases, civil or criminal, the recognisance is in the form of a bond, acknowledging indebtedness to the Crown in a specified sum, to be exonerated on conditions specified. As to civil cases, see BAIL BOND; BAIL PIECE.

Sureties must be sufficient, *i.e.* able to answer for the sum for which they are bound (Hawk., P. C., bk. ii. c. 15, s. 4; 3 Chit. *Gen. Pr.* c. viii. p. 8). As a rule, only householders are accepted. The following persons are not accepted in criminal cases: the solicitor or an accomplice of the person to be bailed, a married woman not having separate estate, an infant, or a prisoner. Before accepting sureties, the Court inquire of them on oath as to their means, and in criminal cases may require notice to the plaintiff, prosecutor, or police, usually twenty-four or forty-eight hours, to enable the necessary inquiries to be made as to the credit and solvency of the proposed sureties. Commissioners for taking bail in civil cases were at one time appointed, but their powers are now given to all commissioners for oaths (52 & 53 Vict. c. 10, s. 1).

A person who acknowledges bail in the name of another, without lawful authority or excuse, is guilty of felony, and punishable by penal servitude, from three to seven years, or imprisonment, with or without hard labour, for not more than two years (24 & 25 Vict. c. 90, s. 34; 54 & 55 Vict. c. 39, s. 1).

1. *Bail in Civil Matters.*—With the abolition of arrest on mesne process, bail in civil cases is virtually extinct. As to its form, see BAIL BOND; BAIL PIECE. Bail bonds continue in use in Admiralty actions *in rem*, for obtaining the release of arrested ships or cargo (R. S. C., Order 9, r. 10; Order 12, rr. 18-21a; Order 29, rr. 6-18; Order 64, r. 10), and replevin bonds are still in use. See REPLEVIN.

A defendant in any personal action in which, before January 1, 1870, he would have been liable to arrest (under a *capias ad respondendum*), can

still be arrested under writ of *ne exeat regno*, or under sec. 6 of the Debtors Act, 1869, 32 & 33 Vict. c. 62, if (1) he is about to quit England; or if (2), except in penal actions, his absence would materially prejudice the plaintiff's case. As to the procedure, see R. S. C., 1883, Order 69. On arrest, the defendant can be imprisoned for not over six months, unless he secures an amount not exceeding the claim, by deposit in Court, or by entering into a bond to the plaintiff with one or more sureties, or giving such other security as the plaintiff will accept (Order 69, r. 3). The condition in ordinary actions is that the defendant will not leave England before the trial without the leave of the Court; and in penal actions for the payment of any sum recovered, or render of the defendant to prison. As to arrest of absconding debtors, see 46 & 47 Vict. c. 52, s. 25; 53 & 54 Vict. c. 71, s. 7; and BANKRUPTCY.

In actions for the recovery of land from tenants holding over, the tenant can, under sec. 213 of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, be required to enter into a recognisance, with two sufficient sureties, to pay the costs and damages. But see R. S. C., Order 3, r. 6; Order 14.

Bail or security on the removal of actions from Courts of inferior jurisdiction (other than County Courts) is regulated by 19 Geo. III. c. 70, s. 6; 7 & 8 Geo. IV. c. 71, s. 6; on the removal from County Courts by 51 & 52 Vict. c. 43, s. 126; and on removal from the Mayor's Court by 20 & 21 Vict. c. clvii. ss. 8, 16-19 (*Morgan* v. *Bowles*, [1894] 1 Q. B. 236).

2. *Bail in Crown Suits.*—As to bail in Crown suits and Revenue proceedings, see EXCHEQUER.

3. *Bail in Criminal Proceedings.*

Bail by Sheriff.—The sheriff, on executing a writ of attachment for security of the peace, may take bail on the terms stated in the body of the writ (Crown Office Rules, 1886, r. 282), or an order to find bail may be made on a return of *cepi corpus* (Crown Office Rules, 1886, rr. 286, 288, 289). Where the sheriff executes a writ of attachment for contempt, he may admit his prisoner to bail (Short and Mellor, *Crown Office Prac.*, p. 400).

The sheriff's other powers and duties as to bail in criminal cases are superseded in practice by those of justices (see Stephen, *Eng. Hist. Crim. Law*, 233-237; and SHERIFF).

Bail by Police Officers.—Where a person is arrested without warrant, and cannot be brought before a Court of summary jurisdiction within twenty-four hours of his arrest, a superintendent or inspector of police may admit him to bail (42 & 43 Vict. c. 49, s. 38); and in the Metropolitan Police District persons brought to a police station in the night, after arrest without warrant for petty misdemeanors, may be bailed by the constable in charge of the station (10 Geo. IV. c. 44, s. 9).

Bail by Justices and Coroners.—On the adjournment of a preliminary inquiry as to an indictable offence, the Court of summary jurisdiction may, in its discretion, admit the accused to bail on his own recognisance, with or without sureties, conditioned for the accused to attend at the time and place appointed for the adjourned hearing (11 & 12 Vict. c. 42, s. 21). These provisions also apply when the adjournment is for the purpose of considering whether the offence should be dealt with summarily (42 & 43 Vict. c. 49, s. 24), and a like provision is made as to bail, on adjournment of a charge triable summarily (11 & 12 Vict. c. 43, s. 16). There is some doubt whether the High Court can interfere with

the discretion of a justice to refuse bail on remand (see Short and Mellor, *Crown Office Prac.* p. 374; Glen's *Summary Jurisdiction Acts*, 8th ed., by Douglas, 371-372; Arch. Cr. Pl., 23rd ed., 113).

As to bail on committal for trial the rules are as follows:—(*a*) On charges of treason, bail may not be granted by a justice except by order of a Secretary of State or of the High Court, or of a judge thereof in vacation (11 & 12 Vict. c. 42, s. 23). (*b*) Under sec. 5 (2) of the Coroners Act, 1887, 50 & 51 Vict. c. 71, a coroner may admit to bail a person charged with manslaughter by an inquisition taken before him. (*c*) Bail by justices is discretionary on charges of felony, attempting to obtain any property by false pretences, and all misdemeanors, the costs of the prosecution whereof are payable out of the county or borough rate or fund (12 & 13 Vict. c. 42, s. 23; 42 & 43 Vict. c. 49, s. 49). For a list of these offences, see Arch. Cr. Pl., 23rd ed., 247, and COSTS. The enumeration in 11 & 12 Vict. c. 42, s. 23, corresponds with that of 7 Geo. IV. c. 64, s. 23; but certain of the offences in both lists are now either abolished (38 & 39 Vict. c. 86), or dealt with as to costs, etc., by the Criminal Law Consolidation Acts of 1861. (*d*) In the case of all other misdemeanors, bail is obligatory (11 & 12 Vict. c. 42, s. 23), if sufficient sureties are tendered, and may be granted without sureties under 61 & 62 Vict. c. 7. Demand of excessive bail is contrary to the Bill of Rights (1 Will. & Mary, sess. 2, c. 2). Refusal by a justice, from improper motives, to grant bail is said to be a misdemeanor (*R.* v. *Badger*, 1842, 4 Q. B. 66); and gives a cause of action against the justice (*Linford* v. *Fitzroy*, 1849, 13 Q. B. 240). These rules also apply to a person arrested upon the warrant of a justice, on a certificate that an indictment has been found against him (11 & 12 Vict. c. 42, s. 3). The recognisances taken by justices are transmitted with the depositions to the Court of trial (11 & 12 Vict. c. 48, ss. 23, 24). Where bail is discretionary, the justice's duty is to consider the probability of the accused appearing on the remand, or to take his trial, and the character of the offence, the nature of its punishment, and the weight of the evidence, are of subsidiary importance (*R.* v. *Scaife*, 1841, 10 L. J. M. C. 144; *Ex parte Barronet*, 1852, 1 El. & Bl. 1; *In re Robinson*, 1854, 23 L. J. Q. B. 286).

The committing justice may admit the accused to bail at any time after commitment for trial, up till the first day of the sittings of the Court at which he is to be tried, or if they are adjourned, up till the day to which they are adjourned (11 & 12 Vict. c. 42, s. 23); and in cases where bail is obligatory this power may be exercised, on the application of the accused, by a visiting justice of the prison to which the accused is sent, or any justice of the county or place in which it is situate (11 & 12 Vict. c. 48, s. 23).

The committing justice must also certify by indorsement or warrant of commitment his consent to bail, where it is discretionary or obligatory, and the amount which he thinks sufficient; and any justice attending at the prison where the accused is, or the governor of the prison, may admit the accused to bail in conformity with the certificate, on production of the recognisances of the sureties duly taken (11 & 12 Vict. c. 48, s. 23, subs. (3); 42 & 43 Vict. c. 49, s. 42; 52 & 53 Vict. c. 63, s. 13 (111)). Sureties (under 11 & 12 Vict. c. 42, s. 23) may be dispensed with if the justice thinks that to do so will not defeat the ends of justice (61 & 62 Vict. c. 7). Where a justice admits to bail a person who is in prison, he

makes out a warrant of deliverance, which is the authority for the prisoner's release (11 & 12 Vict. c. 42, s. 24, subs. (4)).

Where a person summarily convicted appeals to Quarter Sessions, the Court, before which he enters into a recognisance to prosecute his appeal, may, on his entering in the recognisance, or giving such other security as they think fit, release him from custody (42 & 43 Vict. c. 49, s. 31); and similar provision is made where he appeals to the High Court by case stated (20 & 21 Vict. c. 43, s. 3; 42 & 43 Vict. c. 49, s. 33).

Bail is taken before justices by stating verbally to the accused and his sureties the substance of the recognisance, and giving them a written notice thereof (11 & 12 Vict. c. 42, forms S (1) S (2); Summary Jurisdiction Rules, 1886, form 36). It may be taken in Court, or out of Court before any justice, the magistrates' clerk, or superintendent, or inspector of police, or the governor of the prison in which the accused is (42 & 43 Vict. c. 49, s. 42).

Bail by the Court of Trial.—The Court of trial may bail any person to be tried before it while awaiting trial or during his trial. Persons in custody, if not tried at the first practicable sittings of the Court, must be bailed, unless there are special reasons proved on oath for postponing the trial (31 Chas. II. c. 2, s. 6. See Arch. Cr. Pl., 23rd ed., 115). Similar provisions are made by the Assizes Relief Act, 1889, 52 & 53 Vict. c. 16. As to the mode of taking a recognisance at Quarter Sessions, see *Ex parte Jefferies*, 1888, 52 J. P. 280. Under the First Offenders Act, 1887, special provision is made for releasing first offenders on bail (50 & 51 Vict. c. 25). After the conviction of the accused, if a case is reserved under the Crown Cases Reserved Act, 1848, the Court of trial may admit the convict to bail by recognisance, with one or two sufficient sureties, conditioned for his appearance at such time as the Court shall direct, to receive judgment, or render himself on execution (11 & 12 Vict. c. 78, s. 1).

Bail by the High Court.—Where a writ of error is obtained (otherwise than by the Attorney-General), after a conviction for misdemeanor, execution is not stayed, nor is the convict released from prison, until he is bound by recognisance of bail. The form of the recognisance is now prescribed by the Crown Office Rules, 1886, rr. 199, 200, form 127, which superseded the Acts 8 & 9 Vict. c. 68, and 16 & 17 Vict. c. 32 (both repealed by the Statute Law Revision Act, 1892).

The High Court has, and always has had, jurisdiction to admit to bail on a criminal charge, whether for treason, felony, or misdemeanor (1 Stephen, *Hist. Crim. Law*), but not in the case of outlawry (2 Hale, P. C., 133). This jurisdiction does not extend to persons imprisoned in execution of sentence, unless there is an appeal pending, whether by writ of error, *certiorari*, or case stated on indictment, or appeal to Quarter Sessions, or by case stated to the High Court from summary convictions.

The contempt prisoner of another Court appears not to be bailable by the High Court; nor is a person, committed by the House of Lords or House of Commons, in any case within their established privileges (*Re Sheriff of Middlesex*, 1840, 11 Ad. & El. 273; 52 R. R. 337). But the High Court can bail persons attached for contempt of itself, or to answer interrogatories (Short and Mellor, *Crown Office Prac.* 391, 400, 402).

In all cases of misdemeanor, the High Court is theoretically bound by

the Habeas Corpus Act, 1679, 31 Car. II. c. 2, s. 2, to grant bail (Stephen, *Hist. Crim. Law Eng.* i. 243; *In re Annie Frost*, 1888, 4 T. L. R. 757; *R.* v. *Spilsbury*, [1898] 2 Q. B. 615, 620), although as to many misdemeanors, justices of the peace have a discretion (*v. sup.*, p. 667).

The powers of the High Court as to bail are the same whether the case is depending there or in an inferior Court. They are exercised—(1) By summons issued *ex parte*, by leave of a judge, for the issue of writs of *habeas corpus ad subjiciendum* to bring up the prisoner, and of writs of *certiorari* to bring up the dispositions taken against him or the conviction; (2) By summons to show cause why the prisoner should not be admitted to bail before a justice of the peace. In felony cases, but not in misdemeanors, the leave of a judge is necessary for the issue of the summons. For procedure, see Crown Office Rules, 1886, r. 122; Short and Mellor, *Crown Office Prac.* 378-382.

There is no appeal from a refusal by a judge at chambers to grant bail or a writ of *habeas corpus*, either to a Divisional Court or the Court of Appeal (36 & 37 Vict. c. 66, s. 50; and 57 & 58 Vict. c. 16, s. 1 (1) (*b*); *R.* v. *Foote*, 1883, 10 Q. B. D. 378; *Ex parte Pulbrook*, [1892] 1 Q. B. 86): but the applicant has a right to renew his application to a Divisional Court, and if it be for a *habeas corpus* may go the round of the High Court and to the Lord Chancellor; *Ex parte Wideman*, 1848, 12 Jur. 719; *Ex parte Coppin*, 1866, L. R. 2 Ch. 47). Where the High Court allows bail in felony, four sureties are usually required. In misdemeanors, two are enough. Such bail is justified either before a judge at chambers or the Master of the Crown Office, or, if so ordered, before a justice resident near the place where the accused is imprisoned (Short and Mellor, *Crown Office Prac.* 381, 382).

Enforcing Recognisances.—In criminal cases, a recognisance, if for something to be done before a Court of summary jurisdiction, can be enforced by such Court, by an order declaring it forfeited, and the payment of the sum secured is enforced in the same way as payment of a fine imposed on conviction (42 & 43 Vict. c. 49, ss. 9, 21 (3)). This provision applies to proceedings under the Indictable Offences Act, 1848, and the Summary Jurisdiction Acts, and supersedes the old law which required such recognisances to be sent to the clerk of the peace with a certificate of non-compliance, and left the forfeiture to the Court of Quarter Sessions.

In the High Court, the Court orders the recognisance to be estreated into the Exchequer, *i.e.* extracted from the other records and enforced under 22 & 23 Vict. c. 21, s. 28. See ESTREATS.

In Courts of Quarter Sessions, after an order made to forfeit a recognisance, the amount is levied by the sheriff and returned to the Treasury by the clerk of the peace, under the Levy of Fines Acts, 1822 and 1824, 3 Geo. IV. c. 46; 4 Geo. IV. c. 37.

See also BAIL (ADMIRALTY).

Bail (Admiralty).—In Admiralty proceedings *in rem*, the owner of the *res* is generally entitled to have his property released from arrest on giving bail to an amount equal to the value of the property. This applies to defendants on counter claims (*i.e.* plaintiffs), as much as to defendants on claims; and where, in the former case, the defendant's ship has been arrested, and the plaintiff's ship cannot be arrested, the plaintiff's action may be stayed till they give security to answer judgment

on the counter-claim (24 Vict. c. 10, s. 34; *The Charkieh*, 1873, 42 L. J. Adm. 70). But if the defendant's ship is not arrested, nor bail required for her, or if the plaintiffs discontinue their action, the defendants cannot get bail on their counter-claim (*The Alne Home*, 1882, 4 Asp. 591; *The Alexander*, 1883, 5 Asp. 89); and the plaintiffs, in an action *in personam*, who have given bail for their ship on a counter-claim, cannot get proceedings stayed till the defendants give security to answer the claim (*The Rougemont*, [1893] P. 275). If the foreign owners of a foreign ship sue *in personam* the owners of an English ship for damages done by collision, and the latter counter-claim, the plaintiffs cannot be compelled to give security in respect of the counter-claim either under the Admiralty Court Act, 1861, or under the Judicature Act (*The James Westoll*, [1905] P. 47).

Effect of Bail.—As a general rule, bail is the equivalent of the *res* (*The Christiansborg*, 1885, 10 P. D. 155, Fry, L.J.), or is a substitute for it (*The Staffordshire*, 1872, L. R. 4 P. C. 194, 211); but it does not represent the *res* for all purposes, for "the liability of the owner of the *res* is not confined to the same amount as the liability of the bail" (*The Dictator*), [1892] P. 304, Jeune, J.). Thus the property may be re-arrested before final judgment is given in the action, if the bail falls short of its value, or taken in execution for the balance of a judgment against the *res* though bail has been given for the full value (*The Gemma*, [1899] P. 285; but see Williams and Bruce, *Admiralty Practice*, Introduction); or the owners may be proceeded against *in personam* for the balance of the claim which is unsatisfied by the *res* (*The Dictator*, above, where, in a salvage action, bail was accepted for £5000, and the Court made an award of £7500). Where the bail exceeds the value of the *res*, the bail is only liable to the extent of that value, and not for the amount of damage done (*The Duchesse de Brabant*, 1857, Swa. Ad. 264; Williams and Bruce, 293; but see *supra*).

Where Bail is Allowed.—This right of the owner of the *res* may be exercised in all actions, even those for the possession of ships (*The Peggy*, 1802, 4 Rob. C. 306, Lord Stowell); and though Dr. Lushington seems to have thought that this was not the practice in such actions (*The Mary or Alexandra*, 1867, L. R. 1 Ad. & Ec. 335), Sir Robert Phillimore agrees with Lord Stowell: "Even in possessory actions, the Court would always accede to an application to release on bail, where it was possible to do so without defeating the object of the writ" (*The Gauntlet*, 1870, L. R. 3 Ad. & Ec. 19), where a ship, arrested under the Foreign Enlistment Act (see FOREIGN ENLISTMENT), was allowed to be bailed, the Crown consenting, but that consent not being necessary in order to do so (*The Evangelistria*, 1876, 2 P. D. 241). For actions of restraint, the minority of part owners who object to the ship being sent on a particular voyage can obtain bail from the majority for her safe returning (*The Keroula*, 1886, 6 Asp. 23), although they have agreed to the appointment of a particular manager for the ship (*The England*, 1886, 12 P. D. 32). In salvage cases, the property may be detained, notwithstanding bail, till the values are proved or agreed (see Order 29, generally).

Amount of Bail.—It may not be required to an amount exceeding the value of the property, however large the claim in the action may be, but it is allowed up to the full value (*The Kalamazoo*, 1851, 15 Jur. 885, Dr. Lushington). The owner of the property can, if he chooses, have its full value determined by appraisement, which is conclusive,

and give bail only for that (see APPRAISEMENT); or that value may be admitted (*The Betsey*, 1804, 5 Rob. C. 295), or proved, all of which equally are conclusive, except in case of a *bonâ fide* mistake (*The James Armstrong*, 1875, L. R. 4 Ad. & Ec. 380). In actions by shipowners to limit their liability (now under the Merchants' Shipping Act, 1894, s. 503), the bail is limited to the extent of that statutory liability (*The Sisters*, 1876, 1 P. D. 281), interests, and costs (*The Northumbria*, 1869, L. R. 3 Ad. & Ec. 6). The more usual practice is to give bail for the amount claimed in the suit, without attempting to estimate the value of the *res*: "Bail is taken for more or less without ascertaining whether that is the actual value or not, leaving that matter a subject for future consideration" (*The Mellona*, 1848, 6 N. C. 65, Dr. Lushington). But if an exorbitant amount of bail is demanded, the Court may show its disapproval by depriving the plaintiffs of their costs, or condemning them in the costs incurred by the defendant in giving that amount of bail (*The Earl Grey*, 1853, 1 Sp. Eccl. & Adm.; *The Agamemnon*, 1883, 5 Asp. 92; *The George Gordon*, 1884, 9 P. D. 41). The expense of procuring bail, *i.e.* the commission or fee paid to a person for becoming surety to a bail bond or otherwise giving security, provided that it does not exceed £1 per cent. on the amount of the bail, may now be recovered on taxation as part of the consequential damage (R. S. C., November 1900, s. 5, altering *The British Commerce*, 1884, 9 P. D. 128; and see *The Numida*, 1885, 10 P. D. 158). Where the amount of claim is excessive, the Court may order it and the bail to be reduced (*The Chieftain*, 1863, 32 L. J. Ad. 106; *The St. Olaf*, 1869, L. R. 2 Ad. & Ec. 360, where bail was not allowed to an amount including repairs done to the ship since the arrest). Under the Admiralty Court Act, 1861, s. 33, bail may be taken sufficient to cover not only the judgment of the Admiralty Court, but also that of the Appellate Court (see *The Victoria*, 1876, 1 P. D. 280).

Form and Formalities of Bail.—It can be given before a registrar (either Admiralty or district) or a commissioner for oaths (Order 12, rr. 19, 20, 21). In London the practice is to take it before the latter. A bond is executed by two persons as sureties, to the effect that they submit themselves to the jurisdiction of the Court, and consent that if the party for whom they are bound shall not pay what may be adjudged in the action against him, with costs, execution may issue against them for a sum not exceeding the amount named in the bond (R. S. C., App. A., part ii. No. 13). This form is the same as that in the old practice, no form of bond having been issued under the Admiralty Court Act, 1861 (*The Helene*, 1865, B. & L. 425; *The Victoria, ante*), and this does not provide for the costs of an appeal, though the last-mentioned Act expressly allows this (*ibid.*). A solicitor's undertaking to give bail has been treated as equivalent to giving bail and entering a *caveat* warrant (*The Crimdon*, [1900] P. 171). In actions of restraint, a special form of bond is required, *i.e.* only for the value of the minority's shares (*The Robert Dickinson*, 1884, 10 P. D. 15; *The Vivienne*, 1887, 6 Asp. 178), *i.e.* the same proportion of the value of the ship as the plaintiff's shares bear to the whole number of shares in her (*The Cawdor*, [1900] P. 47). The sureties swear affidavits to justify (*i.e.* that the surety is worth more than the sum in which bail is to be given, after payment of all his debts), and sign the bond in which, under the old practice, their description and address had to be given (*The Tamarac*, 1860, Lush. 28). These docu-

ments are then, with notice to the other side, filed in the registry where the action is proceeding. The sureties must not be partners (*The Corner*, 1863, B. & L. 161); and may be examined before the registrar on their affidavits (*The Don Ricardo*, 1880, 5 P. D. 121; *The Fairport*, 1882, 8 P. D. 55). They are not liable till the shipowner makes default, and are discharged, if the parties so agree, or in ordinary cases by long lapse of time, or by the person for whom they are sureties ceasing to be owner of the subject of bail (*The Vivienne*, 1887, 12 P. D. 32). If the bail bond is broken, *e.g.* by the ship not coming to the named port where she was to return, the bond is forfeited and the money ordered to be paid into Court unless the sureties can show reason to the contrary, and on forfeiture the plaintiff must assign his shares to the defendants (*The Cawdor, No.* 2, 1899, 8 Asp. 607; 9 Asp. 19).

[Williams and Bruce, *Practice*; *Annual Practice*; Roscoe, *Admiralty Practice*.]

FORMS.

I. *Notice of Bail taken before a Commissioner.*

WE, , solicitors for the defendants, hereby give you notice that we tender A. B., of , in the county of , and C. D., of , in the county of , as bail on behalf of the defendant in this action, in the sum of £ , to answer judgment in this action, and that such bail was taken and perfected[1] before , of Liverpool, in the county of Lancaster, commissioner, on the day of .

Dated .

II. *Affidavit of Service of Notice of Bail.*

I, P. H., of , make oath and say :—

1. I am a clerk in the employ of Messrs. , of , in the county of Middlesex, solicitors, the London agents of , of Liverpool, in the county of Lancaster, solicitor for the defendant in this action.

2. On the day of , at of the clock in the noon, I served at the office of Messrs. , of , a notice of bail, whereof a true copy is hereunto annexed and marked N.

III. *Notice of Objection to Bail.*

WE, , solicitors for the plaintiffs, hereby give notice that we object to , of , and , of , the persons tendered as bail herein on behalf of , the owner of the said ship or vessel " ," defendant in this action.

To the Admiralty marshal, and to the defendant's solicitors or agent, and to whom else it may concern.

[1] *Where bail is perfected at different places, proceed as follows* :—by the said A. B., before , of , in the county of , commissioner, on the day of , and by the said C. D. before , of , in the county of , commissioner, on the day of .

IV. *Consent to Bail Bond being Executed Immediately.*

I, , solicitor for the plaintiffs, hereby consent that the bail bond herein may be immediately executed and filed, and that the said vessel may be forthwith released.

V. *Form of Bail Bond in an Action of Restraint.*

"Vivienne."

Whereas an action of restraint has been commenced in the High Court of Justice on behalf of A. B., the owner of 43 sixty-fourth shares in the steamship "Vivienne," against the said steamship "Vivienne," and against the remaining owners of the same defendants intervening: Now, therefore, we, and , jointly and severally submit ourselves to the jurisdiction of the Court, and consent that if the aforesaid steamship "Vivienne" shall not safely return to a port within the jurisdiction of this honourable Court from as many voyages as she shall sail upon before notice shall have been given to the defendants by the plaintiffs that they withdraw their claims for security for the value of their shares in the said steamship, execution may issue against us for a sum not exceeding £3000, being the value of the plaintiff's shares in the said steamship.

This bail bond was signed, &c. [*signature of sureties*].

Before me .

Bail Bond.—A bond in favour of the sheriff, executed by a person on his arrest on a *capias ad respondendum* in a personal action, and by two other persons as his sureties, conditioned for his causing special bail to be put in for him within a limited time in the Court and action in which he was arrested (1 & 2 Vict. 110, s. 4; 3 Chit. *Gen. Pract.* 363-367). This was called putting in "bail below." If the condition was not satisfied and notice thereof given to sheriff and plaintiff, the sheriff could sue on the bail bond or assign it to the plaintiff (Bullen and Leake, *Prec. Pl.*, 3rd ed., 69-71).

Bail Court.—The small Court in Westminster Hall in which a single judge sat, under 11 Geo. IV. and 1 Will. IV. c. 70, by which the number of judges in the superior Courts of common law was increased by three, and judges were authorised to sit alone for justifying special bail, and certain other matters of practice and procedure, previously dealt with by the Courts in banc, and now for the most part disposed of by a judge or master at chambers (see 3 Chit. *Gen. Pract.* c. viii. pp. 11-18).

Bail Piece.—Special bail or "bail above" was put in under a bail bond before a judge in London, or a commissioner for taking bail in the country, by the sureties attending and justifying, *i.e.* proving by affidavit their credit and solvency, and acknowledging the recognisance and giving notice to plaintiff and sheriff so as to vacate the bail bond (3 Chit. *Gen. Pract.* c. viii. p. 373).

The bail piece, a document on parchment, containing a minute of the nature of the recognisance, was verbally acknowledged, signed by the judge, and sometimes also by the sureties, and filed (3 Chit. *Gen. Pract.* c. viii. pp. 377, 378, 382).

Bailiff.—1. *Of a Lord of a Manor.*—A person appointed by the lord to manage his property and superintend its cultivation. His precise duties, as also those of the manorial officers, are explained in the treatise called "Senechaucie," printed in *Walter of Henley*, a volume published by the English Historical Society in 1890. Sometimes these duties were performed by officials having other titles, and sometimes the bailiff of a manor performed the same duties as the bailiff of a franchise or liberty.

2. *Of a Franchise or Liberty.*—A person who executed writs and processes, and empannelled juries within the liberty. He was usually remunerated by small fees, paid by the persons employing him, out of the proceeds of execution. He was appointed by the lord of the franchise or liberty. See FRANCHISE.

3. *Of a Sheriff.*—Persons employed for the same purposes as the bailiffs of a liberty, but within a county. The sheriff is responsible for the trespasses and misdemeanors of his bailiffs, and they are therefore bound to him in an obligation, with sureties, for the proper execution of their office, and are called *bound* bailiffs. There are also certain persons called *special* bailiffs; these are appointed by the sheriff at the request of a party to a suit for the purpose of executing a particular process. A sheriff is not responsible for the trespasses and misdemeanors of a special bailiff. See SHERIFF.

4. *Bailiffs of County Court.*—By the County Court Acts, 1888, it is provided that for every County Court there shall be one or more high bailiffs, appointed by the judge and removable by the Lord Chancellor; and every person so appointed is empowered to appoint such a number of assistant-bailiffs as shall be allowed by the judge, and to dismiss them; but an assistant-bailiff may also be suspended or dismissed by the judge (s. 33). His duties are to serve all summonses and orders, and, with some exceptions, to execute all warrants, precepts, and writs issued out of the Court, but every high bailiff is responsible for all the acts and defaults of himself and his assistants, in like manner as a sheriff is responsible for the acts and defaults of himself and his officers (s. 35). Every bailiff who shall, by neglect or connivance or omission, lose the opportunity of levying any execution is answerable to the person aggrieved (s. 49). No action can be brought against any bailiff for any act done in obedience to an order of the Court without six days' notice (s. 54). Any warrant to a bailiff to give possession of a tenement justifies him in entering upon the premises named in the warrant, and giving possession, so long as the entry be made between the hours of nine a.m. and four p.m. (s. 142). A high bailiff may interplead where any claims are made to or in respect of any goods taken in execution (s. 157). The judge may authorise any of the high bailiff's assistants to act as brokers or appraisers for the purpose of selling goods taken in execution (s. 159). By the Law of Distress Amendment Act, 1888, no person may act as a bailiff to levy any distress for rent unless he is authorised to act as a bailiff by a certificate in writing under the hand of a County Court judge. [By County Court Rules, Order 29, r. 6, bailiffs are prohibited

from being securities in any case where security is required.] See COUNTY COURTS.

Bailiff Errant.—A sheriff's bailiff appointed to execute writs and process in all parts of the county.

Bailiwick.—The district under the jurisdiction of a bailiff, and also a county with respect to the jurisdiction of a sheriff.

Bailments.

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Definition.—Bailment is the general name applied to a class of contracts of which the common element consists in the delivery by one person (the bailor) to another person (the bailee) of the possession of chattels, either to be delivered by the bailee to a third person, or to be re-delivered to the bailor when the purpose of the bailment is at an end. The purpose of the bailment is the leading fact which determines the mutual rights and liabilities of bailor and bailee; and as such it affords the basis of the commonly accepted classification of bailments.

The possession intended by the definition must be distinguished from the bare custody or physical detention of a servant; for a servant who has the custody of his master's property, as servant, has not possession of that property. But constructive delivery is sufficient to satisfy the definition. When an owner in possession of goods sells them to another, but, instead of actually delivering them to the purchaser, agrees to retain possession of them on his behalf, there is a complete contract of bailment; his possession as owner being converted by the agreement into a possession as bailee for the purchaser (*Castle* v. *Sworder*, 1861, 6 H. & N. 828). In the same way, if a person sells to another goods which are in the possession of a warehouseman, the warehouseman, by attorning to the purchaser, becomes a bailee for him.

Preliminary Distinctions.—It is desirable to notice at the outset some fundamental distinctions which constantly recur in the cases, and upon one or other of which important principles depend. *First.* A bailment may be either gratuitous or for reward—a distinction which affects the degree of diligence which the law exacts from a bailee. It is obviously reasonable that a person who undertakes to keep a chattel for another, in consideration of a money payment, should be bound to exercise greater care than one who agrees to do so as a mere friendly service. There is, however, an ambiguity in the term "gratuitous bailment," since it may mean a bailment for the sole benefit of the bailor, or a bailment for the sole benefit of the bailee. *Secondly.* A bailment may be a simple bail-

ment, in which the bailee acquires only the *possession* of the chattel; or it may confer on the bailee a *special property* or interest in the chattel, by virtue of which he has a right to retain possession of it for a time as against his bailor. This distinction is important with reference to the right to maintain an action at law in respect of the chattel. The typical instances of a special property are the contracts of pledge and hiring: when chattels are pledged as security for a debt, the pledgee has a special property until the money is paid or tendered; and when chattels are let to hire for a term, the hirer has a special property until the owner's right to resume possession arises, according to the terms of the agreement. So, when a bill of sale is given in security for the payment of money, the grantor has a special property in the chattels, or a right to retain possession until the happening of some event which entitles the grantee to take possession (see s. 7 of the Bills of Sale Act, 1882). A contract of pledge or hiring is determined by a wrongful act of the pledgee or hirer, which amounts to a repudiation of the bailment. *Thirdly.* A bailment for a specific and limited purpose must be distinguished from a general bailment. If a horse is let on hire for riding, but not for jumping, it is an actionable wrong to use it for jumping so that it is injured (*Burnard* v. *Haggis*, 1863, 14 C. B. N. S. 45). If a pledgee re-delivers the goods to the pledgor generally, he relinquishes his right; but he may re-deliver them to the pledgor for a limited purpose without losing his right—as where he entrusts them to the pledgor, as his agent, to be sold on his behalf (*North-Western Bank* v. *Poynter*, [1895] App. Cas. 56). A bailee, who is entitled to the temporary possession of a chattel, and delivers it back to the bailor for a special purpose, may, after the purpose is satisfied and during his temporary right, maintain trover for it against the bailor (*Roberts* v. *Wyatt*, 1810, 2 Taun. 268; 11 R. R. 566). But, in such a case, if the bailor deals with the chattel in a manner altogether inconsistent with the limited purpose, the sub-bailment is determined, and the bailee is remitted to his original right of possession (see *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202). *Fourthly.* A bailment may be either a general bailment, in which the rights and liabilities of the parties are left to be ascertained by the common law; or it may be a bailment on special conditions, where the legal rights of the parties are varied by express agreement. Thus, a warehouseman who receives goods for safe custody may make himself liable as an insurer by expressly warranting their safety; or, on the other hand, he may receive them subject to a condition that, in case of loss by negligence, his liability is to be limited to a particular sum. *Lastly.* Though the law of bailments rests upon the distinction between property and possession, and it is sometimes said that the bailor has the property and the bailee the possession, it is not at all necessary that the legal property should be in the bailor. A mere finder of property, who has no title, may bail it to another; and a bailee may, in some cases, create a sub-bailment between himself and a third person, or even between himself and the original bailor. Such expressions merely import that a bailor must have a title relatively prior and paramount to that of the bailee—in other words, a right of possession out of which the right of possession of the bailee may be derived. From this it follows, on the one hand, that the bailee, having accepted possession from the bailor, is generally estopped from disputing his title; and, on the other hand, that a bailee cannot, as against the real owner, have a better title than his bailor.

Classification of Bailments; Rights and Liabilities of Bailor and Bailee inter se.

The classification of bailments which is generally adopted is that of Lord Holt, whose judgment in the celebrated case of *Coggs* v. *Bernard*, 1704, 2 Raym. (Ld.) 909; 1 Smith's L. C., 11th ed., 173, forms the starting-point of the modern law of bailments. It is convenient to discuss the mutual rights and liabilities of bailor and bailee by following this classification and noting the principal modern decisions under the respective statements of Lord Holt. The six kinds of bailments are: *Depositum*, *Commodatum*, *Locatio et conductio*, *Vadium* (pawn or pledge), *Locatio operis faciendi*, and *Mandatum*.

I. *Depositum*.—"A bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor," and "where the bailee is not to have any reward." In this case, says Lord Holt, "the bailee is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect. . . . Such a bailee is not chargeable without an apparent gross neglect. . . . If the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect."

The defendant, a coffee-house keeper, with whom the plaintiff had deposited a sum of money for safe custody, put it in his cash-box in the tap-room, which had a bar in it and was open on Sunday, though the other parts of the house were not. The cash-box was stolen on a Sunday. The jury were directed that it did not follow, from the defendant's having lost his own money at the same time as the plaintiff's, that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own; and that that fact afforded no answer if they believed that the loss occurred from gross negligence. The jury having found a verdict for the plaintiff, the Court refused to set it aside (*Doorman* v. *Jenkins*, 1834, 2 Ad. & E. 256; 41 R. R. 429). The plaintiff deposited with a bank, as gratuitous bailees, a strong box containing securities, of which he retained the key. The box was placed in the strong room where the securities of the bank were kept, and to which the cashier of the bank had access. The cashier abstracted some debentures from the box, and absconded. In an action against the bank it was held, by the Colonial Court and the Privy Council, that there was no evidence of gross negligence, for which alone the bank, as gratuitous bailees, could be held liable (*Giblin* v. *M'Mullen*, 1868, L. R. 2 P. C. 317; 5 Moo. P. C. (N. S.) 434; 16 E. R. 578).

A person cannot be made liable as a bailee without his consent. If goods are sent to a person without his knowledge or consent, and without any previous communication with him, there is nothing to raise a contract of bailment, and the recipient is under no liability for the safe custody of the goods (*Lethbridge* v. *Phillips*, 1819, 2 Stark. N. P. 544; *Howard* v. *Harris*, 1884, C. & E. 253). When chattels are brought by one person upon premises in the occupation of another, the question whether possession has been given to the latter, so as to create a contract of bailment, is one of fact (see *Ancona* v. *Rogers*, 1876, 1 Ex. D. 285; *Neuwith* v. *Over Darwen Industrial Society*, 1894, 63 L. J. Q. B. 290). For a case where a restaurant-keeper has been held liable for the loss of an overcoat entrusted by a customer to a waiter, see *Ultzen* v. *Nicols*, [1894] 1 Q. B. 92.

A depositary has no implied right to use the thing entrusted to him, but such a right may be expressly given. When money is handed by one man to another for safe custody, with permission to use it in his business, the depositary stands in a fiduciary position, and the transaction must be distinguished from a loan or debt (*In re Tidd; Tidd* v. *Overell*, [1893] 3 Ch. 154).

II. *Commodatum.*—"When goods or chattels that are useful are lent to a friend gratis, to be used by him; and this is called *commodatum*, because the thing is to be restored *in specie*." In this case, says Lord Holt, "the borrower is bound to the strictest care and diligence to keep the goods, so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so as if the bailee be guilty of the least neglect he will be answerable: as if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under; and it may be, if the horse had been used no otherwise than he was lent, that accident would not have befallen him. . . . But if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable; because the neglect gave the thieves occasion to steal the horse."

The borrower must not deviate from the conditions of the loan. Thus, in an old case, it was held that the defendant who had borrowed a horse from the plaintiff to ride was not justified in allowing his servant to ride it, the permission being in the nature of a licence not communicable to another (*Bringloe* v. *Morrice*, 1676, 1 Mod. 210). On the other hand, where a horse was for sale, and the agent of the vendor lent it to A. for the purpose of trying it, A. was held to be justified in putting a competent person upon the horse to try it, there being an implied authority to do so (*Camoys* v. *Scurr*, 1840, 9 Car. & P. 383).

As a borrower in point of law represents himself to the lender as a person of competent skill to take care of the thing lent (*per* Parke, B., *Wilson* v. *Brett*, 1843, 11 Mee. & W. 113; 63 R. R. 528), the lender is taken to represent that, so far as he is aware, the borrower may safely make use of the chattel for the purpose intended. This principle is applied where the borrower sues the lender for damage resulting directly from the defective condition of the chattel lent. See *Blakemore* v. *Bristol and Exeter Rly. Co.*, 1858, 8 El. & Bl. 1035, and *MacCarthy* v. *Young*, 1861, 6 H. & N. 329, where personal injuries were sustained through the defective condition of a crane and a scaffold respectively. In the former case, Coleridge, J., delivering the judgment of the Court of Queen's Bench, stated the law in terms which were adopted by the Court of Exchequer in the second case. "It may, we think, be safely laid down that the duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud. So, on the other hand, as the lender lends for

beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. . . . This is so consonant to reason and justice that it cannot but be part of our law. Would it not be monstrous to hold that, if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities, and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? . . . By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him." [But the law goes no further than this. Consequently, in order that a bailee may succeed, it must be shown that there was some concealment by the bailor of a material fact known to him, or some such negligence in not disclosing the facts relating to the article lent as would amount to the same thing (*Coughlin* v. *Gillison*, [1899] 1 Q. B., at pp. 147, 148).]

III. *Locatio et conductio* (*Lending for Hire*).—"When goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, and the lender is called *locator*, and the borrower *conductor*." "In this case," says Lord Holt, "the bailee is also bound to take the utmost care, and to return the goods when the time of the hiring is expired." But more modern authorities do not place a hirer on the same footing as a borrower; the modern rule is that a hirer is bound to exercise ordinary diligence, that is, such a degree of care as a prudent man would take of his own goods.

When the hirer of a horse, instead of calling in a veterinary surgeon, prescribed for it himself so improperly that the horse soon after died in great agony, he was held responsible for the loss (*Dean* v. *Keate*, 1811, 3 Camp. N. P. 4; 13 R. R. 735). A Cambridge undergraduate hired a mare for a ride on the road, being told specifically that she was not let for jumping; having, nevertheless, lent the mare to a friend, who put her to a fence so that she was transfixed by a stake and killed, the hirer, though an infant, was held liable for the wrong done (*Burnard* v. *Haggis*, 1863, 14 C. B. N. S. 45).

If damage is caused to a stranger by the negligence of the hirer's servants, it is of course the hirer, not the owner, who is liable; and it makes no difference that the owner's name and address are affixed to the chattel (a traction engine) under statutory provision, *i.e.* the Locomotives Act, 1865, s. 7 (*Smith* v. *Bailey*, [1891] 2 Q. B. 403; [*Jones* v. *Scullard*, [1898] 2 Q. B. 565]).

The hirer may be liable to the bailor for damage caused to the chattel by an act of his servant in circumstances which would not render him liable to a stranger. The defendant had hired a carriage and horse from the plaintiffs. The defendant's coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage and horse were injured, owing to the coachman's negligent driving. Held, that there had been a breach of the defendant's contract as bailee, for which he was liable (*Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413). [*Aliter*, however, where the servant is not acting within the scope of his employment (*Sanderson* v. *Collins*, [1904] 1 K. B. 628; *Cheshire* v. *Bailey*, [1905] 1 K. B. 237). If the hirer of goods takes the control of the chattel

from an accompanying servant of the owner and transfer it to a third party, he warrants the capacity of that third party, and becomes responsible to the owner for any damage immediately resulting from such transference (*Stead* v. *Bligh*, 1898, 62 J. P. 458).]

As regards the duty of the bailor to the bailee, with reference to defects in the chattel let out for hire, it has been decided that he is an insurer, not against all defects, but against all defects which care and skill can guard against. The duty of a person who lets out carriages is "to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if while the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie* v. *Griggs*, 1809, 2 Camp. N. P. 79; 11 R. R. 666, and as the railway company did in *Readhead* v. *Midland Rly. Co.*, 1869, L. R. 4 Q. B. 379, he will not be liable; but no proof short of this will exonerate him" (Lindley, J., *Hyman* v. *Nye*, 1881, 6 Q. B. D. 685).

[When the owner of a chattel, who also supplies an attendant therewith, has express notice of the purpose for which the hirer requires its use, he is bound to supply a proper attendant, as well as a chattel reasonably fit for the particular employment which was within the contemplation of both parties at the time when the contract was made. And should the servant prove negligent, the owner is responsible to the hirer for any loss which he may sustain thereby (*Abraham* v. *Bullock*, 1902, 86 L. T. 796). In such a case, the owner will be liable for damage to third parties caused by the negligence of servants, for whom he has assumed responsibility, even though, for some purposes, they are the particular servants of the hirer (*Waldock* v. *Winfield*, [1901] 2 K. B. 596). The rule laid down in *Abraham* v. *Bullock*, *supra*, does not apply where the servant is not acting within the scope of his employment (*Cheshire* v. *Bailey*, [1905] 1 K. B. 237).]

See further, as to the rights and duties of hirers, and especially as to the hire-purchase system, HIRING AGREEMENT.

IV. *Vadium* (*Pawn or Pledge*).—"When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin *vadium*, and in English a pawn or a pledge." "In effect," says Lord Holt, "if a creditor takes a pawn, he is bound to restore it upon the payment of the debt; but yet it is sufficient, if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawnor for his debt. . . . The law requires nothing extraordinary of the pawnee, but only that he shall use an ordinary care for restoring the goods. But, indeed, if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them; because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong must be answerable for them at all events; for the detaining of them by him is the reason of the loss."

In accordance with this statement, it seems that at common law a pawnbroker is not liable for damage to, or loss of, the chattels by accidental fire; but that when the chattels have been stolen by burglars,

the fact that the premises had been left unprotected for twenty-four hours is sufficient evidence of negligence to render the pawnbroker liable (see *Ex parte Cording*, 1832, 4 Barn. & Adol. 198; *Syred* v. *Carruthers*, 1858, El. B. & E. 469; *Shackell* v. *West*, 1859, 2 El. & El. 326. These cases were decided under a repealed statute, the words of which, "default, neglect, or wilful misbehaviour," do not, however, enlarge the common-law liability).

See further PAWN; PAWNBROKER.

[A pledgee neither has himself, nor can convey to another, a larger interest in chattels than that which was possessed by the pledgor from whom he received them. Thus, if a life tenant pledge heirlooms, and the pledgee, upon failure to redeem, sells them to a *bonâ fide* purchaser, the buyer acquires no title against the remainder-man (*Studdert* v. *West*, Law Times (15 Feb. 1902), 353.]

V. *Locatio operis faciendi.*—"When goods or chattels are delivered to be carried, or something is to be done about them, for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them." In this case a distinction is drawn between a person exercising a public employment and a private person.

(*a*) A person exercising a public employment for reward (*e.g.* a common carrier) is, says Lord Holt, "bound to answer for the goods at all events. . . . The law charges this person thus intrusted to carry goods, against all events, but acts of God and of the enemies of the King. For, though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered." On this subject see CARRIER, INNKEEPER; and as to the historical origin of the special liability attaching to carriers by the common law, see *Nugent* v. *Smith*, 1875, 1876, 1 C. P. D. 19, 423; Holmes on the *Common Law*, pp. 180 *et seq.*

(*b*) A private person acting as a bailee for hire is not subject to so strict a rule of liability. "Though a bailie is to have a reward for his management," says Lord Holt, "yet he is only to do the best he can. And if he be robbed, etc., it is a good account. . . . If he receives his master's money, and keeps it locked up with a reasonable care, he shall not be answerable for it, though it be stolen. . . . The true reason of the case is, it would be unreasonable to charge him with a trust, further than the nature of the thing puts it in his power to perform it." The duty of bailees of this class has been defined by the Privy Council as follows:—Bailees for hire are "under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation includes, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks are imminent or have actually occurred (*Brabant* v. *King*, [1895] App. Cas. 632).

This principle may be illustrated by the following examples:—

An agister of cattle does not insure their safety; but if they are killed or injured through his negligence, he is liable; as when they are lost through the fences being kept in such an improper state that the agister, if he took proper care, could not have been ignorant of it (*Broadwater* v. *Blot*, 1817, Holt, 547; 17 R. R. 677; explained in *Searle* v. *Laverick*, 1874, L. R. 9 Q. B. 122). Where a banking company accepted a deposit of railway share certificates for safe custody on behalf of a customer, and undertook to receive the dividends for him in consideration of a small commission, they were held to be bailees for reward of the certificates. The company kept the certificates, with their own securities, in a strong box in the manager's room, of which box the manager kept the key. No record was kept of securities in their custody. The Lords Justices held that the company were guilty of negligence in allowing their manager to have unrestricted control over the securities (*In re United Service Company*, 1871, L. R. 6 Ch. 212). The defendant, a livery-stable keeper, with whom the plaintiff's carriages had been deposited for safe custody for reward, lodged them in a shed which had been erected for him by an independent contractor. The shed was blown down by a high wind, and the carriages injured. The defendant having been ignorant of any defect in the shed, it was held that if he had exercised, in the employment of the builder, such care as an ordinary careful man would use, he was not liable for damage caused by the carelessness of the builder, of which he had no notice. A depositary for hire must take reasonable care that any building in which the chattel is deposited is in a proper state, so that the chattel may be reasonably safe in it; but there is no implied warranty or obligation that the building is absolutely safe (*Searle* v. *Laverick*, 1874, L. R. 9 Q. B. 122). The Queensland Government, as bailees for hire, stored explosive goods belonging to the plaintiffs in sheds near the water's edge, and the goods were destroyed by an exceptionally high flood. In these circumstances the Privy Council held that two questions of fact arose—(1) Whether the officials of the Government had failed to exercise due care and skill in storing the goods at so low a level; and (2) Whether, on the advent of the flood, they failed to take reasonable and proper measures for saving the whole or any part of the goods from destruction (*Brabant* v. *King*, [1895] App. Cas. 632). The Privy Council also held that the bailors were entitled to rely upon the care and skill of their bailees, and rejected the contention that, as the bailors had had an opportunity of observing certain defects in the storehouse, they must be taken to have agreed that any risk of injury to their goods, which might possibly be occasioned by those defects, should be borne by them, and not by the bailees (*Brabant* v. *King*, *supra*).

Though a bailee for hire is not liable for accidental loss or destruction, not resulting from his negligence, yet the onus is on him to prove that he has taken reasonable and proper care (*Mackenzie* v. *Cox*, 1840, 9 Car. & P. 632; 62 R. R. 762). Thus, if an attorney is sued in detinue for a deed which has been entrusted to him by a client, it is no answer for him to say simply that he has lost it (*Reeve* v. *Palmer*, 1858, 5 C. B. N. S. 84).

A bailee for hire may receive goods for safe custody upon special conditions—as in the common case of a cloak-room at a railway station.

In such a case, if the bailees set up a special condition, restrictive of their liability, contained in a ticket, receipt, or voucher handed to the bailor, it is a question of fact "whether the bailees did what was reasonably sufficient to give the bailor notice of the conditions on which they consented to receive the goods" (*Parker* v. *South-Eastern Railway Company*, 1877, 2 C. P. D. 416).

If a person who has contracted to warehouse goods at a particular place, chooses to warehouse them at another place not authorised by the bailor, and they are there destroyed without any negligence on his part, he is liable to the bailor for breach of contract; and if the bailor loses the benefit of an insurance effected by him, by reason of the place of deposit being wrongly described in the policy, the damage is not too remote to be recovered (*Lilley* v. *Doubleday*, 1881, 7 Q. B. D. 510).

Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him for that purpose, he has a lien for his charges. Thus, an artificer to whom goods are delivered for the purpose of being worked up into form, or a farrier by whose skill an animal is cured of a disease, or a horsebreaker by whose skill it is rendered manageable, have liens on the chattels in respect of their charges (*Bevan* v. *Waters*, 1828, 1 Moo. & M. 236; 33 R. R. 692; *Scarfe* v. *Morgan*, 1838, 4 Mee. & W. 270; 51 R. R. 568). But an agister has no lien at common law (*Jackson* v. *Cummins*, 1839, 5 Mee. & W. 342; 52 R. R. 737); though a lien in the nature of a special property may be given by express agreement (*Richards* v. *Symons*, 1845, 8 Q. B. 90). If a bailee, having a lien on a chattel, chooses to keep the chattel for the purpose of enforcing his lien, he cannot add to his lien a further charge for keeping the chattel till the debt is paid (*Somes* v. *British Empire Shipping Co.*, 1860, 8 H. L. C. 338; 11 E. R. 459).

See also AGISTMENT; AUCTIONEER; FACTOR; LIEN; WAREHOUSEMAN.

VI. *Mandatum.*—"When there is a delivery of goods or chattels to somebody who is to carry them, or do something about them gratis, without any reward for such his work or carriage." In this case, says Lord Holt, "a neglect is a deceit to the bailor. For when he entrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. . . . The owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management."

In *Coggs* v. *Bernard*, an action on the case, the declaration alleged that the defendant "had undertaken safely and securely to take up several hogsheads of brandy, then in a certain cellar in D., and safely and securely to lay them down again in a certain other cellar in Water Lane, the said defendant, and his servants and agents, *tam negligenter et improvide*, put them down again into the said other cellar, that *per defectum curæ*, etc., one of the casks was staved and a great quantity of brandy was spilt." After not guilty pleaded, and a verdict for the plaintiff, the Court held, on a motion in arrest of judgment, that the declaration was good and the action well lay, though the defendant was not a common carrier and was to have nothing for the carriage (*Coggs* v. *Bernard*, 1704, 2 Raym. (Ld.) 909).

The decision in *Coggs* v. *Bernard* has been the subject of two traditional comments—(1) It has been said that Lord Holt ought to have classed *mandatum* under the same head with *depositum*, the liability of

the bailee in these cases being generally the same; (2) It has been said that in *Coggs* v. *Bernard*, where there was no question of *gross* negligence, the special promise of the defendant to effect the removal safely bound him to stricter diligence than a simple promise would have done. The truth is, that on these points the judgments are far from distinct. The fact that Lord Holt distinguished *mandatum* from *depositum* is partly accounted for by historical reasons. In *depositum*, the remedy of the bailor was detinue or trover, while in *Coggs* v. *Bernard* the plaintiff declared in assumpsit, charging a misfeasance; and the Court were embarrassed by the theoretical difficulty of establishing a *positive* duty, or a duty to do an act carefully, when there was no consideration to support a duty to do it at all. As regards the second point, it is clear that a similar special promise might be made by a depositary. But it is difficult to avoid the conclusion that Lord Holt, apart from the special words of the undertaking, put the liability of a mandatory much higher than that of a depositary. In more recent times it has been held that the words "safely and securely" do not necessarily import absolute assurance, but are to be construed with reference to the character of the party and the nature of the bailment, or, in other words, with reference to the degree of care which under the circumstances the law requires of the bailee (*Ross* v. *Hill*, 1846, 2 C. B. 877). And the law now is, that a mandatory is under the same liability as a depositary: when a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, the bailee is only liable to an action on proof of gross negligence (*Shiells* v. *Blackburne*, 1789, 1 Black. H. 158; 2 R. R. 750). This principle is not limited to bailees, but extends generally to other forms of gratuitous agency.

The defendant undertook voluntarily and without compensation to enter at the custom-house some cut leather for export. He entered it, along with similar goods of his own, as wrought leather instead of dressed leather; and in consequence of this mistake the goods were seized. In an action to recover compensation for the loss, the plaintiff had a verdict; but the Court set it aside and granted a new trial, on the ground that the defendant had not been guilty either of gross negligence or of fraud. But Lord Loughborough, C.J., in laying down the rule that a gratuitous bailee is only liable for gross negligence, added, "But if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. If, in this case, a shipbroker or a clerk in the custom-house had undertaken to enter the goods, a wrong entry would in them be gross negligence, because their situation and employment necessarily imply a competent degree of knowledge in making such entries (*Shiells* v. *Blackburne*, *supra*). So where the defendant, a stage-coachman, received a parcel belonging to the plaintiff to be carried gratis, and it was lost on the road, Lord Tenterden, C.J., directed the jury that the defendant was liable, if there was great negligence on his part (*Beauchamp* v. *Powley*, 1831, 1 M. & Rob. 38).

The owner of a horse entrusted it to the defendant for the purpose of being shown to an intending purchaser. The defendant negligently rode the horse on to a cricket field, where the ground was slippery, and in consequence the horse fell and was injured. The defendant, though a gratuitous bailee, was held liable, on the ground that he was a person

conversant with and skilled in the management of horses, and that he had omitted to use such skill as he possessed (*Wilson* v. *Brett*, 1843, 11 Mee. & W. 113; 63 R. R. 528).

[A mandatary must act without reward, unless the circumstances of common interest with his mandator in the subject-matter of the mandate indicate the contrary; and even then, what he has received above his own interest he has received to the use of the bailor (*The Winkfield*, [1902] P. 42).]

Degrees of Negligence.—A useful classification of bailments, according to the degree of responsibility incurred by the bailee, results from a slight modification of the classification of Lord Holt. The six classes of Lord Holt may be rearranged under three general classes. "The first of these is, where the bailment is for the benefit of the bailor alone; this includes the cases of *mandates* and *deposits*, and in this the bailee is liable only for gross negligence. The second is, where the bailment is for the benefit of the bailee alone; this comprises *loans*, and in this class the bailee is bound to the very strictest diligence. The third is, where the bailment is for the benefit both of bailor and bailee; this includes *locatio rei*, *vadium*, and *locatio operis*, and in this class an ordinary and average degree of diligence is sufficient to exempt the bailee from responsibility" (1 Smith's L. C., 11th ed., p. 236).

The term "gross negligence," which is used as a short and convenient mode of describing the degree of responsibility attaching to a gratuitous bailee, is in some respects open to objection. The real question in every case is whether the bailee has failed to exercise due diligence, the degree of diligence to which he is bound depending in each case on the circumstances and purpose of the bailment. There would, however, be no practical gain from the substitution of a positive for a negative expression (see the observations of Lord Chelmsford in *Giblin* v. *M'Mullen*, 1868, L. R. 2 P. C. 317, at p. 336; 5 Moo. P. C. (N. S.) 434, 460; 16 E. R. 578, 588, and the authorities there cited).

Liabilities of Chattels in the Possession of a Bailee.—While goods or chattels are in the possession of a bailee they are subject to certain liabilities, which must be briefly indicated. They are in general subject to distress for rent. But an exemption exists, for the benefit of trade, in favour of things delivered to a person exercising a trade, to be kept, carried, wrought, or manufactured in the way of his trade (*Simpson* v. *Hartopp*, 1744, Willes, 512; *Muspratt* v. *Gregory*, 1838, 1 Mee. & W. 633, in Ex. Ch. 3 Mee. & W. 677; 46 R. R. 435). Thus, goods consigned to a factor, broker, or commission agent for sale in the way of his business are privileged from distress (*Gilman* v. *Elton*, 1821, 3 B. & B. 75; 23 R. R. 567; *Findon* v. *M'Laren*, 1845, 6 Q. B. 891; 66 R. R. 588). So are goods delivered to an auctioneer to be sold on premises occupied by him (*Adams* v. *Grane*, 1833, 1 Cr. & M. 380; 38 R. R. 624; *Williams* v. *Holmes*, 1853, 8 Ex. 861), though the privilege does not exist if the goods are on premises which are not in the auctioneer's occupation (*Lyons* v. *Elliott*, 1876, 1 Q. B. D. 210). Goods deposited with a wharfinger or warehouseman (*Thompson* v. *Mashiter*, 1823, 1 Bing. 283; 25 R. R. 624), or stored at a furniture warehouse (*Miles* v. *Furber*, 1873, L. R. 8 Q. B. 77), or pledged with a pawnbroker (*Swire* v. *Leach*, 1865, 18 C. B. N. S. 479), are privileged. Goods or materials in the hands of a workman to be wrought, manufactured, or repaired, are privileged, provided there has been a delivery, actual or constructive, for the purposes of trade (see

Clarke v. *Millwall Dock Co.*, 1886, 17 Q. B. D. 494); but there is no similar privilege as regards tools or implements of trade delivered to a workman or trader for use in his business (*Joule* v. *Jackson*, 1841, 7 Mee. & W. 450; 56 R. R. 757). Goods entrusted to a carrier are also privileged, not only on the carrier's premises, but on any premises where they may be during the carriage (*Gisbourn* v. *Hurst*, 1710, 1 Salk. 249).

The chattels are not in general liable to be taken in execution under a judgment against the bailee. But under a *fi. fa.* against a pawnbroker, the sheriff may seize in execution all goods which have been pledged more than twelve months and a week, and are therefore irredeemable; and he has a right to hold the redeemable pledges by way of deposit, to retain for the execution creditor any money paid for redemption, and to sell them when the time for redemption has expired (*In re Rollason*, 1887, 34 Ch. D. 495). As to the right of the sheriff to sell the interest of the hirer in goods let under a hiring agreement, see *Dean* v. *Whittaker*, 1824, 1 Car. & P. 347; *Duffill* v. *Spottiswoode*, 1828, 3 C. & P. 435; *Lancashire Waggon Co.* v. *Fitzhugh*, 1861, 6 H. & N. 502.

The chattels may also be in the order and disposition of the bailee in his trade or business, so as to pass to his trustee in bankruptcy under the reputed ownership clause (sec. 44 of the Bankruptcy Act, 1883). But this clause may be excluded by evidence of a custom of trade, affecting a particular kind of chattels, and so generally known that persons dealing with the bailee could not legitimately infer that he was the owner of such chattels in his possession (see *Ex parte Watkins, In re Couston*, 1873, L. R. 8 Ch. 520; *Ex parte Wingfield, In re Florence*, 1879, 10 Ch. D. 591; *Ex parte Reynolds, In re Barnett*, 1885, 15 Q. B. D. 169).

(See DISTRESS; EXECUTION; REPUTED OWNERSHIP.)

Right to Sue; Measure of Damages.—The right of a bailor or a bailee to maintain an action in respect of the chattels has been the subject of numerous decisions, ancient and modern; but the law on this point has undergone many changes, and cannot even now be regarded as finally settled.

It has always been considered that a bailee is entitled to sue a stranger for an injury to the chattel in his possession, and this, whether he has a special property in the chattel or not, on the general principle that possession is sufficient title against a wrong-doer. The same proposition holds good of a mere finder, who can defend his possession against all the world but the true owner. Thus a gratuitous bailee of a horse was held to have such a property in it as to maintain an action on the case against a neighbour for not repairing fences, whereby the horse was killed (*Rooth* v. *Wilson*, 1817, 1 Barn. & Ald. 59; 18 R. R. 431). So a person who had hired a carriage for a day was held entitled to recover for an injury caused by the negligent driving of the defendant, the plaintiff being the "proprietor" of the carriage for the purpose of the action (*Croft* v. *Alison*, 1821, 4 Barn. & Ald. 590; 23 R. R. 407). So the hirer of chattels under a written agreement was held entitled to sue a wrong-doer in trover without producing the written agreement, which was unstamped (*Burton* v. *Hughes*, 1824, 2 Bing. 173; 27 R. R. 578).

If the bailee, having a special property in the goods, sued the

bailor in trespass or trover, for wrongfully seizing and selling the goods, it was held that he could not recover the whole value of the goods, but only the value of his limited interest (*Brierly* v. *Kendall*, 1852, 17 Q. B. 937).

As regards the right of the bailor to sue, a distinction has been recognised for fully a century.

1. If the bailee had a special property in the chattels, as in the case of a hiring agreement or a pledge, the bailor could not sue in trespass, or trover or detinue, because he had temporarily parted with the right to possession, and in these actions it was necessary for the plaintiff to prove either possession or an immediate right to possession (*Ward* v. *Macauley*, 1791, 4 T. R. 489; *Gordon* v. *Harper*, 1796, 7 T. R. 9; 4 R. R. 369; *Pain* v. *Whittaker*, 1824, Ry. & M. 99; *Bradley* v. *Copley*, 1845, 1 C. B. 685). It was, however, held that the owner of a chattel which was out on hire for an unexpired term, could maintain an action on the case against a stranger, a permanent injury to the chattel being in the nature of an injury to the owner's reversion (*Hall* v. *Pickard*, 1812, 3 Camp. N. P. 187; *Mears* v. *London and South-Western Rly. Co.*, 1862, 11 C. B. N. S. 850). And as late as 1849, in *Manders* v. *Williams*, *infra*, Parke, B., expressed the opinion that cases such as *Gordon* v. *Harper* and *Bradley* v. *Copley*, *supra*, might with propriety have been decided otherwise.

2. If the bailment was determinable at the option of the bailor, so that he had an immediate right to possession, he could sue. Thus, it was held by Lord Ellenborough, C.J., that the owner of a chaise, who had permitted a friend to use it, had constructive possession and could maintain trespass against a stranger for an injury to it during such use (*Lotan* v. *Cross*, 1810, 2 Camp. N. P. 464). In actions of trover by a bailor against a wrong-doer, it was laid down that either the bailor or the bailee could maintain the action (Parke, B., *Nicolls* v. *Bastard*, 1835, 2 C. M. & R. 659; 41 R. R. 814; *Manders* v. *Williams*, 1849, 4 Ex. 339; see Williams, J., *Mears* v. *London and South-Western Rly. Co.*, *supra*); and it was added that "whichever first obtains damages it is a full satisfaction," and that "a recovery by one ousts the other of his action" (see *Nicolls* v. *Bastard*, *supra*; Bac. Abr., Trover, C.). These expressions would be unmeaning if they did not imply that the whole damages could be recovered either by the bailor or by the bailee. Hence, it was supposed that if a bailee recovered the whole value of the chattel, he held the residue over his own damage in trust for the bailor; and the rule that a bailee, such as a warehouseman, has an insurable interest, and may recover the whole value in case of loss by fire, accounting to the bailor for the surplus over his own damage, seems to have been historically an extension of this supposed rule (see the argument of Mellish in *Waters* v. *Monarch Insurance Co.*, 1856, 5 El. & Bl. 870).

It was decided by Hawkins and Wills, JJ., that where a bailee is not "liable over" to his bailor, he is not entitled to recover the whole amount of the depreciation in the chattel caused by the wrongful act of a third party. He can only recover such damages as he has himself sustained. For damages over and above, the bailor must sue (*Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422). Kennedy, J., held that, on the principle of *Claridge's Case*, *supra*, the plaintiff had no sufficient right of ownership in the goods to entitle him to recover the

amount by which their value had been diminished, but that he was entitled to recover the loss of profits which he had sustained by being deprived of the samples during the remainder of the season (*Brown* v. *Hand-in-Hand Fire Insurance Society*, 1895, 11 T. L. R. 538).

[The principle laid down in *Claridge's Case, supra*, was, however, overruled by the Court of Appeal in *The Winkfield*, [1902] P. 42, in which it was held that, in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.] In America the law has been laid down in terms similar to those formerly used in this country (*Woodman* v. *Nottingham*, 1870, 49 New Hampshire, 387; Sedgwick's *Leading Cases on Measure of Damages*, 685), and though in that case the plaintiff seems to have been liable over to the bailor, under the contract of bailment, the rule was not rested upon that fact. Besides the cases above cited, reference may be made to *Sutton* v. *Buck*, 1810, 2 Taun. 302; 11 R. R. 585; *Turner* v. *Hardcastle*, 1862, 11 C. B. N. S. 683; *Swire* v. *Leach*, 1865, 18 C. B. N. S. 479.

As to the measure of damages in an action by the bailor against the bailee for wrongfully converting the goods, see *Chinery* v. *Viall*, 1860, 5 H. & N. 288; *Johnson* v. *Stear*, 1863, 15 C. B. N. S. 330; *Donald* v. *Suckling*, 1866, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, 1868, L. R. 3 Ex. 299; *Mulliner* v. *Florence*, 1878, 3 Q. B. D. 484; *Henderson* v. *Williams*, [1895] 1 Q. B. 521.

Assignment by Bailor and Attornment by Bailee.—The bailor may assign to another his property or interest in goods or chattels in the bailee's possession. Even in the case of a pledge by the owner of goods, where the pledgee has a special property, the general property remains in the pledgor, and is assignable by him at law; his right is not a mere chose in action (*Franklin* v. *Neate*, 1844, 13 Mee. & W. 481; 67 R. R. 683). As to the assignment of the owner's rights under a hiring agreement, see HIRING AGREEMENT.

If the bailee attorns to the title of a *bonâ fide* purchaser by informing him that the goods are now held at his disposal, he is estopped from afterwards setting up any defect in the vendor's title (*Henderson* v. *Williams*, [1895] 1 Q. B. 521). Such an attornment is equivalent to a representation that the property has passed to the purchaser, and the estoppel arises when the purchaser, induced by the representation, alters his position by paying the price to the vendor (*Biddle* v. *Bond*, 1865, 6 B. & S. 225), or when, but for the representation, he might have recovered back from the vendor the price he has already paid (*Knights* v. *Wiffen*, 1870, L. R. 5 Q. B. 660). After a transfer or delivery order is presented to the bailee and attorned to by him, he holds for the buyer, but until such attornment there is no sufficient acceptance and receipt by the buyer to satisfy sec. 17 of the Statute of Frauds (*Farina* v. *Home*, 1846, 16 Mee. & W. 119; 73 R. R. 433; *Bentall* v. *Burn*, 1824, 3 Barn. & Cress. 423; 27 R. R. 391; see now sec. 4 of the Sale of Goods Act, 1893). As to evidence of acceptance and receipt, when the bailor has agreed to sell the chattels to the bailee in whose possession they are, see *Lillywhite* v. *Devereux*, 1846, 15 Mee. & W. 285; 71 R. R. 670; *Taylor* v. *Wakefield*, 1856, 6 El. & Bl. 765.

Determination of Bailment.—When chattels are bailed for safe custody, to be restored when required, a demand is necessary before the bailee

can be sued for not delivering them back. But if the bailee has wrongfully converted them, the bailor may elect to sue him for damages for the tort, or for the proceeds of the conversion without any demand. The distinction is of importance with reference to the time from which the Statute of Limitations begins to run (see *Granger* v. *George*, 1826, 5 Barn. & Cress. 149; 29 R. R. 196; *Wilkinson* v. *Verity*, 1871, L. R. 6 C. P. 206; *Miller* v. *Dell*, [1891] 1 Q. B. 468; *In re Tidd*, [1893] 3 Ch. 154).

If a chattel is bailed by two co-owners the bailee is not liable in trover, if he refuses to deliver it up to one only (*May* v. *Harper*, 1811, 13 East, 197; 12 R. R. 322; *Harper* v. *Godsell*, 1870, L. R. 5 Q. B. 422). If one of two co-owners pledges the chattel for his own debt, the other cannot recover it from the pledgee unless he has a special property or right of possession as against his co-owner (*Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202).

A bailment may be determined by what is equivalent to eviction by title paramount, so that the bailee may set up the *jus tertii* in answer to the bailor's claim for re-delivery (*Biddle* v. *Bond*, 1865, 6 B. & S. 225). Thus, where A. had deposited goods with B. for the purpose of defeating an execution, and afterwards called on B. to return them, it was held that B. could set up the title of a third person to whom A. had assigned the goods before the deposit; for a re-delivery to the depositor would have rendered him liable in an action of trover by the real owner (*Cheesman* v. *Exall*, 1851, 6 Ex. Rep. 341). So, if goods have been entrusted to a common carrier by a person having no title, and the real owner demands the goods before the carrier has parted with them, and the carrier delivers them to him, this is a good defence to an action by the bailor against the carrier. "The law," said Willes, J., in delivering the judgment of the Court, "would have protected the defendants against the real owner, if they had delivered the goods in pursuance of their employment, without notice of his claim. It ought equally to protect them against the pseudo-owner, from whom they could not refuse to receive the goods, in the event of the real owner claiming the goods, and their being given up to him. The compulsory character of the employment of a carrier furnishes ample ground for so holding" (*Sheridan* v. *New Quay Co.*, 1858, 4 C. B. N. S. 618). When the bailor mortgages the chattel subsequent to the bailment, and the mortgagee has the right to demand possession from the bailee, and does demand it, the bailee is justified in refusing to give the chattel up to the bailor (*European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 1861, 30 L. J. C. P. 247). When the bailee is evicted by title paramount, he is not responsible to the bailor for injury sustained by the latter, unless there is a special contract, or he is in some way to blame for the loss (*Ross* v. *Edwards*, 1895, 73 L. T. 100).

But a bailee cannot set up a *jus tertii* if he accepted the bailment with full knowledge of the adverse claim (see *Ex parte Davies, re Sadler*, 1881, 19 Ch. D. 86), nor is he entitled to set up the *jus tertii* merely because he has become aware of the title of a third person, or because an adverse claim is made upon him, though in the latter case he may be entitled to interplead (*Biddle* v. *Bond*, 1865, 6 B. & S. 225). When a bailor, who has deposited goods with a warehouseman, has afterwards sold them and received the price, and indorsed the delivery order to the purchaser, he is still entitled to delivery of them on demand, unless the

warehouseman can prove that he holds them upon the right and title and by the authority of the purchaser (*Rogers* v. *Lambert*, [1891] 1 Q. B. 318).

A bailment may be determined by the accidental loss or destruction of the chattel bailed. "In all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to re-deliver the chattel" (Blackburn, J., *Taylor* v. *Caldwell*, 1863, 3 B. & S. 826). Thus, where a ship delivered to a shipwright for repair was destroyed by accidental fire, it was held that the shipwright was not liable for the loss, but could recover from the owner the value of work and materials employed in repairs (*Menetone* v. *Athawes*, 1764, 3 Burr. 1592).

A bailment is determined by any wrongful act of the bailee which amounts to a repudiation of the contract. Thus, if the hirer of goods wrongfully sells them, the bailment is determined, and the owner may at once maintain an action of trover against even a *bonâ fide* purchaser (*Cooper* v. *Willomat*, 1845, 1 C. B. 672; 68 R. R. 798); and the same principle applies when a mortgagor in possession under a demise for a term, sells the goods (*Fenn* v. *Bittleston*, 1851, 7 Ex. Rep. 152). (See Bills of Sale; Conversion; Factor; Hiring Agreement.) At common law, a bailee who was lawfully in possession of goods could not commit the offence of larceny, unless by "breaking bulk" he committed a trespass; but by 24 & 25 Vict. c. 96, s. 3, "whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any other person than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction." See Larceny.

[Where an insolvent bailee, who wrongfully converts goods, is sued by his bailor in tort, for detinue and conversion, and files his petition before judgment, the creditor, by reason of sec. 37 of the Bankruptcy Act, 1883, is precluded from proving against the bailee's estate for the amount of the judgment debt and costs (*In re Hopkins*, 1902, 86 L. T. 504).]

[See Smith's L. C., i. pp. 167-230; Addison on *Contracts*; Jones on *Bailments*; Story on *Bailments*; Wyatt Paine on *Bailments*; Beal's *Law of Bailment*; Beven on *Negligence*; Dicey on *Parties to an Action*; Holmes on the *Common Law*, Lectures v. and vi.]

Bakehouse.—Bakehouses have been subject to statutory regulations since 1862 (26 & 27 Vict. c. 40). The Act of 1862 was repealed and replaced by the Factory and Workshop Act, 1878, which, with the amending Acts up to 1895, has been repealed and replaced by the Factory and Workshop Act, 1901 (1 Edw. vii. c. 22).

A bakehouse, for the purposes of the Act of 1901, is a place in which are baked biscuits or confectionery, from the baking or selling of which a profit is derived (s. 149, Sched. 6, pt. 2). It is a "workshop" for the purposes of the Act, unless within it or within its close or curtilage or

precincts, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; in which event it is treated as a non-textile factory (s. 149, subs. 1 (*b*)), and is subject to the regulations of the Act as to the employment of women and young persons and children (ss. 26, 27), and to special regulations as to the employment of male young persons above sixteen, in that part of the bakehouse in which the baking of bread is carried on (s. 38). There are also in force orders of a Secretary of State regulating overtime in baking bread and biscuits (ss. 51 (3), 59, Order, December 20, 1882, St. R. & O. Revised (ed. 1904), vol. iv., tit. "Factory," p. 27), and dealing with meal hours in bakeries where travelling-ovens are used (February 24, 1887, St. R. & O. Revised (ed. 1904), vol. iv., tit. "Factory," p. 14).

From 1863 to 1878 the sanitary supervision of all bakehouses was in the hands of the local authorities; from 1878 to 1883, in the hands of inspectors of factories. From 1883 onwards the supervision of retail bakehouses has been in the hands of the local authority. In addition to the ordinary sanitary provisions as to factories and workshops, the Act contains several sections (97-102) dealing specially with bakehouses. The sections are administered by the factory inspectors where no retail business is done, but are administered by the local sanitary authority in the case of retail bakehouses, *i.e.* "any bakehouse or place not being a factory (see above), the bread, biscuits, or confectionery baked in which are sold, not wholesale but by retail, in some shop or place occupied with the bakehouse" (s. 102); and for the purposes of the administration the medical officer of the local authority has all the powers of a Home Office inspector under the Factory Act, 1901 (*ibid.*). The local authorities in London are the Court of Common Council and the Metropolitan Borough Council (s. 153 (4)), and elsewhere the borough councils and urban or rural district councils.

The general provisions as to cleanliness, ventilation, and other sanitary conditions are enforced, in respect of bakehouses which are non-textile factories, by the Home Office inspectors, and in the case of bakehouses which are "workshops," by the local sanitary authority, subject to a power by the factory inspectors to act in default of the local authority (Factory Act, 1901, ss. 1-9, 101, 125; Public Health (London) Act, 1891, 54 & 55 Vict. c. 76, ss. 2 (1) (*g*), 26; Public Health Act, 1875, 38 & 39 Vict. c. 55, s. 91; Sanitary Accommodation Order, February 4, 1903, St. R. & O., 1903, No. 89).

The more important special sanitary regulations affecting bakehouses are as follows:—

Limewashing, etc.—Sec. 99 of the Factory and Workshop Act, 1901, provides for the limewashing, or painting or varnishing of the interior of all bakehouses at specified times.

Sleeping-Places.—A place on the same level with a bakehouse, and forming part of the same building, must not be used as a sleeping-place, unless it is effectually separated from the bakehouse by a partition extending from the floor to the ceiling, and unless there be an external glazed window of at least nine superficial feet in area, of which at least four and a half are made to open for ventilation (Factory and Workshop Act, 1901, s. 100; see also Home Office Order, December 30, 1903, St. R. & O. 1903, No. 1157).

Sanitary Regulations.—(1) No water-closet, etc., shall be within or communicate directly with the bakehouse; (2) Every cistern for the

bakehouse, shall be separate and distinct from any cistern for supplying a water-closet; (3) No drain or pipe for carrying off sewage matter shall have an opening within the bakehouse (Factory Act, 1901, s. 97).

Underground Bakehouses.—An "underground" bakehouse may not be used as such unless it was so "used" on August 17, 1901 (s. 101 (1) (3)). It was held on the Act of 1895, from which this section is transferred, that a bakehouse vacant on 6th July 1895 was within the section if a tenant for it as a bakehouse was being sought (*Schwerzerhof* v. *Wilkins*, [1898] 1 Q. B. 640). This decision appears to apply equally to the Act of 1901. And since January 1, 1902, no underground bakehouse may be used unless it has been certified by the local authority to be suitable for the purpose (s. 101 (2)). The authority may not issue the certificate unless satisfied that the place is suitable in construction, light, ventilation, and in all other respects (s. 101 (4)). An appeal lies against refusal of certificate (s. 101 (5)) to a Court of summary jurisdiction, which may apportion among the persons interested in the place the cost of the necessary alterations, or, at the request of the occupier, may determine the lease (s. 101 (7) (8)). In making the apportionment it is just and equitable to consider the terms of the contracts of tenancy. The High Court has no original jurisdiction in such a case (*Stuckey* v. *Hooke*, [1906] 2 K. B. 20).

Penalties.—Various fines and penalties are prescribed for contravention of these provisions (see Act of 1901, s. 97 (2), 98, 99 (2), 100 (2). See Redgrave, *Factory Acts* (8th ed.); Evans Austin's *Factory Acts* (2nd ed., 1901), and FACTORY).

Balance of Constitution.—In every State there resides a sovereign authority to do any executive act within the limits of its jurisdiction, to decide any disputed question, to make or abrogate any law. Where this authority is vested in a single person, the government is properly described as an absolute monarchy. Justinian, *e.g.* as emperor, was absolute; he could make any law—*Quod principi placuit, legis habet vigorem.* It is true that he professed to derive his powers from the *lex regia* passed at the beginning of his reign, but this, it need hardly be said, was a mere form. A good emperor would desire to be considered *juris religiosissimus*, but his observance of the law was voluntary; *licet enim legibus soluti sumus, attamen legibus vivimus.* These texts of Roman law were freely used by the partisans of monarchy in the Middle Ages. Bracton applies the maxim, *Quod principi placuit*, etc., to the King of England, and Mr. Maitland conjectures that the famous passage which places the law above the king, was no part of Bracton's original text. But already, in Bracton's time, men were beginning to deny that the king could change the law and custom of the realm, unless with consent of the barons and (in matters which directly concerned them) of the commons. This is now the established rule of our constitution; the sovereign authority of the State is the King in Parliament. The authority of Parliament is absolute and transcendent. Coke indeed held that Parliament could not enact anything contrary to the law of God; and Holt said that if Parliament made a man judge in his own case, the Act would be void. But these *dicta* are inconsistent with the doctrine of sovereignty, as expounded by modern writers. If a judge may declare an Act void, because it is contrary to natural justice, this simply means that the

judge's notion of natural justice is to prevail against the opinion of the legislature. If, then, we say that our constitution is balanced, we mean, not that there is any legal limit to the power of Parliament, but that an unlimited power of legislation is vested in a body composed of three parts, no one of which can alter the law without the consent of the other two. In countries where the ordinary legislature is limited by a written constitution, it is not always easy to determine where (if anywhere) sovereignty resides. Austin and his school hold that the sovereign authority of the United States is the combination of State legislatures, or conventions, which is required to authorise an amendment of the American constitution; but this theory, as Mr. H. Sidgwick has pointed out, involves Austin in the questionable statement that the American people are "in the habit of obedience" to an authority which is called into existence at long intervals, and for limited and temporary purposes. Congress cannot amend the constitution, which is regarded as the fundamental law of the republic. Parliament can amend or change any law; and Mr. Dicey has gone so far as to suggest that there are no fundamental laws of the English realm. It may, however, be questioned whether Parliament can fundamentally alter its own constitution—whether, *e.g.* the Lords can legally consent to the abolition of their House as a component part of Parliament. It is of course politically possible that the House of Lords may cease to exist, but a jurist might argue that the destruction of a necessary component part of the legislature is not an act of sovereignty, but the constitution of a new sovereign.

The theory of a balanced government may be connected with the theory of division of powers. Under an absolute government, such as that of France before the revolution of 1789, legislative and executive power are in the same hands, and the executive overrides the judicial authority by acts of State. Montesquieu perceived that the boasted liberty of Englishmen was due to the fact that the three powers were in a great measure independent of one another, and his analysis of the English constitution has furnished a basis for the written constitutions of many modern States.

[Justinian, *Inst.* i. 2, and ii. 17; Montesquieu, *Esprit de Lois*, l. xi. ch. vi.; Maitland, *Bracton's Note-Book*, i. 29. For the doctrine that Acts of Parliament are controlled by the common law, or by the law of nature, see *Dr. Bonham's Case*, 8 Rep. 118; *Day* v. *Savadge*, 12 Jac. I., Hob. 87; *City of London* v. *Wood*, 13 Will. III., 12 Mod. 687. The doctrine is criticised by Willes, J., in *Lee* v. *Bude and Torrington Rly. Co.*, 1871, L. R. 6 C. P. 582.]

Balance of Power.—A term used in diplomacy to describe such a balancing of the power of States as will secure each against an overwhelming preponderance of any one of them.

"The doctrine of the balance of power," says Lorimer, "has been regarded as embodying the fundamental conception of cosmopolitan organisation ever since the Peace of Westphalia in 1648" (*Law of Nations*, vol. ii. p. 197). . . . "It is a proclamation of *solidarité* within the limits of recognition of the interdependence as opposed to the independence of States" (p. 199).

The first public document which mentions the balance of power is the Treaty of Utrecht (1713), the preamble to which recites that it is

entered into "ad formandam stabiliendamque pacem ac tranquillitatem Christiani orbis justo potentiæ æquilibrio."

The doctrine has now lost much of its significance in Western Europe, though it still remains among the traditions of diplomacy in the relations of the Great Powers with Eastern Europe and the extreme East.

Balance Order.—In the case of non-compliance by a contributory, in the winding-up of a company, with an order made upon him for a call, another and special order, called a balance order, is made, requiring him to pay what has been found to be due from him within four days after service (Rule 35, the Companies Act, 1862). Such an order may be enforced, like other orders in Chancery, by *fieri facias, levari facias, elegit,* sequestration, charging order and attachment of debts (sec. 20, Act of 1862, and Order 45, R. S. C., 1883).

A writ of *ne exeat regno* (*q.v.*) may also be issued on motion *ex parte,* to prevent a defaulting contributor from absconding without paying the call. See sec. 18 of the Act for extending the remedies of creditors against the property of debtors, 1 & 2 Vict. c. 110.

By secs. 122 and 123 of the Act of 1862, orders made in England are enforced in Scotland and Ireland, in accordance with the provisions of those sections.

Though a balance order under sec. 120 resembles a judgment in carrying with it the same remedies, there is no merger of the original cause of action.

It is a mere direction given by the Court for the better getting in an asset. But though a balance order for calls made either before or in the winding-up cannot be enforced by action (*Chalk, Webb & Co.* v. *Tennent,* 1888, 36 W. R. 263), nor made the foundation of bankruptcy proceedings (*Ex parte Whinney,* 1884, 13 Q. B. D. 476, and *Ex parte Grimwade,* 1886, 17 Q. B. D. 357), yet an action may be maintained in respect of the calls as an original debt (*Westmoreland Slate Co.* v. *Fielden,* [1891] 3 Ch. 15). Notwithstanding a balance order, an executor may still retain his own debt out of his testator's estate who was liable as a contributor (*International Marine, etc., Co.* v. *Hawes,* 1885, 29 Ch. D. 934). See EXECUTORS AND ADMINISTRATORS (*Retainer*).

Balance-Sheet.—See COMPANY.

Bale.—A term in commerce usually employed to denote a compressed package of goods; but "it is an ambiguous word, which may mean many things, and therefore it is for a jury to say what it means in a mercantile contract" (*per* Cresswell, J., *Gorrisen* v. *Perrin,* 1857, 27 L. J. C. P. 32). So in *Taylor* v. *Briggs,* 1827, 2 Car. & P. 525, where one party contended that bale meant a compressed bale, the other that it meant a bag, Abbott, C.J., left the meaning of the term to the jury, who found that a bale meant a compressed bale; and see *Benson* v. *Schneider,* 1817, 7 Taun. 272.

Balk.—An unploughed strip of land lying between lands which are private property, bounding the tilled portions of the fields. The arable lands of a township were generally divided into large parcels, called furlongs or shots, separated from each other by broad strips left untilled, generally covered with bushes, called balks. These parcels

were sub-divided into a number of parallel strips, each of which was called a stiche or ridge (Latin, *selio*). The stiches were likewise separated by balks of untilled earth. In some places the stiches were themselves called balks (Seebohm, *English Village Commun;* Elton, *Law of Commons and Waste Land*, 23, 153; Elphinstone, *Interpretation of Deeds*, 562).

It is doubtful whether there is a presumption of law that the balks are the property of the owners of the adjacent soil (*Godmanchester* v. *Phillips*, 1836, 4 Ad. & E. 560-561).

Ballast.—See HARBOURS.

Ballot.

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Mode of Voting by Ballot.—The primary meaning of the word "ballot," as its etymology denotes, is to record a vote by means of small balls. For the purposes of election law, however, the ballot signifies the system of secret voting which, for the protection of voters against intimidation and other external influence, was introduced into parliamentary and municipal elections by the Ballot Act, 1872, 35 & 36 Vict. c. 33, in substitution for the previous system of open voting.

That Act provides (s. 2) that in the case of a poll at an election the votes are to be given by ballot. The ballot of each voter is to consist of a paper, termed a ballot paper, showing the names and description of the candidates. Each ballot paper is to have a number printed on the back, and, attached to it, a counterfoil with the same number printed on the face. At the time of voting the ballot paper is to be marked on both sides with an official mark, and delivered to the voter within the polling station. The number of the voter on the register of voters is to be marked on the counterfoil. The voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, is to place it in a box, called a ballot-box, in the presence of the presiding officer, after having shown him the official mark at the back of the paper. After the close of the poll the ballot-boxes are to be sealed up, so as to prevent the introduction of additional ballot papers, and taken charge of by the returning officer, who, in the presence of such agents of the candidate as may be in attendance, is to open the ballot-boxes, count the total number of ballot papers, and ascertain the result of the poll, by counting the votes given to each candidate, and forthwith declare the candidate or candidates having the majority of votes to be elected, and return their names to the Clerk of the Crown in Chancery.

Directions for Guidance of Voter.—Certain directions for the guidance of the voter in voting are required by the Act (see Sched. 2), to be printed

in conspicuous characters and placarded outside every polling station. These show for how many candidates the voter may vote, and direct that on receiving the ballot paper the voter is to go into one of the compartments at the polling station and, with the pencil provided, place a cross on the right-hand side opposite the name of each candidate for whom he votes; there is, however, no objection to the use of any other pencil or ink, or other means of marking the paper, provided that no indication is thereby afforded as to the identity of the voter (see *Wigtown*, 1874, 2 O'M. & H. 223; *Berwick*, 1880, 3 O'M. & H. 180). If the voter inadvertently spoils a ballot paper, he should return it to the officer, who will give him another paper (Sched. 1, r. 28).

Votes Marked by Presiding Officer.—In the case of a voter, incapacitated, from blindness or other physical cause, from voting, as prescribed by the Act, or where the voter is a Jew, and the poll is on a Saturday, and he objects on religious grounds to vote as prescribed by the Act, or if the voter makes a declaration that he is unable to read, the presiding officer must, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot paper in manner directed by such voter, and the paper to be placed in the ballot-box (Sched. 1, r. 26).

In the case of an illiterate voter the following form (given in Sched. 2) must be filled in :—

Form of Declaration of Inability to Read.

I, A. B., of , being numbered on the Register of Voters for the county [*or* borough] of , do hereby declare that I am unable to read.

A. B., his mark.

I, the undersigned, being the presiding officer for the polling station for the county [*or* borough, *or division of the county or borough*] of , do hereby certify that the above declaration, having been first read to the above-named A. B., was signed by him in my presence with his mark.

(*Signed*) C. D.
Presiding Officer for polling station
for the county [*or borough or division*
of the county or borough of .]

day of 19 .

The name and number on the register of every voter whose vote is so marked, and the reason why it is so marked, must be entered on a list called the "List of Votes Marked by the Presiding Officer" (Sched. 1, r. 26).

Duties of Returning Officer.—It is the duty of the returning officer to provide a sufficient number of polling stations at each polling place, to distribute them amongst the voters in such manner as he thinks most convenient, and to give public notice of the situation of the polling stations, and a description of the voters entitled to vote at each station. Each polling station must be furnished with such number of compartments in which voters can mark their votes, screened from observation, as the returning officer thinks necessary; and there must be at least one compartment for every hundred and fifty electors. No person is to be

admitted to vote at any polling station except the one allotted to him. But as to the voting of police at parliamentary elections, see the Police Disabilities Removal Act, 1887, 50 & 51 Vict. c. 9, which was extended to other elections by the Police Disabilities Removal Act, 1893, 56 Vict. c. 6. The returning officer must also provide such ballot-boxes, stamping instruments, copies of register of voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election in the manner provided by the Act (see s. 8, and Sched. 1, rr. 15-21). In one case an election was held to be void where the returning officer omitted to provide sufficient ballot-boxes, papers, stamps, and other materials, there being consequently no poll at two of the polling stations (*Hackney*, 1874, 2 O'M. & H. 77).

Ballot-Boxes.—Every ballot-box must be so constructed that the ballot papers can be introduced therein, but cannot be withdrawn therefrom without the box being unlocked. Just before the commencement of the poll the presiding officer at each polling station is to show the ballot-box empty to such persons as may be present, so that they may see that it is empty, and he is then to lock it and place his seal upon it so as to prevent its being opened without breaking such seal, and to place it in his view for the reception of the ballot papers (Sched. 1, r. 23).

Ballot Papers.—The ballot papers must as nearly as possible be in the form given by the Act, and must contain the surname of each candidate; and if there are two or more candidates of the same surname, also their other names, printed in large characters, and their names, addresses, and descriptions printed underneath in small characters, and must be capable of being folded up (Sched. 1, r. 22).

A form of ballot paper and directions as to printing are contained in Sched. 2. The form of ballot paper is thus :—

FORM OF BALLOT PAPER.

Form of Front of Ballot Paper.

Counterfoil No.	BROWN. (JOHN BROWN of 53 George Street, Bristol, Merchant.)	
NOTE.—*The counterfoil is to have a number to correspond with that on the back of the ballot paper.*	JONES. (WILLIAM DAVID JONES of High Elms, Wilts, Esq.)	
	MERTON. (Hon. GEORGE TRAVIS, commonly called Viscount Merton of Swanworth, Berks.)	
	SMITH. (HENRY SYDNEY SMITH of 72 High Street, Bath, Attorney.)	

Form of Back of Ballot Paper.

No. .

Election for county [*or* borough, *or* division of county *or* borough] 19 .

NOTE.—*The number on the ballot paper is to correspond with that in the counterfoil.*

There are two sorts of ballot papers, the ordinary papers, and others, which must be of a different colour, for the tendered votes (Sched. 1, r. 27).

Tendered Votes.—If a person representing himself to be a particular elector named on the register applies for a ballot paper, after some one else has already voted in his name, the presiding officer may ask him the two questions allowed by law to be put when a voter comes to the poll, viz., as to his identity, and whether he has already voted.

Sec. 81 of the Parliamentary Registration Act, 1843, 6 & 7 Vict. c. 18, provides that no inquiry shall be permitted at the time of polling as to the right of any person to vote except only that the returning officer or his deputy shall, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions or either of them :—

Form of Questions.

1. Are you the same person whose name appears as A. B. on the Register of Voters now in force for the county of [*or* for the riding, parts, *or* division of the county of], or for the city [*or* borough] of [*as the case may be*] ?

2. Have you already voted, either here or elsewhere, at this election for the county of [*or* for the riding, parts, *or* division of the county of], or for the city [*or* borough] of [*as the case may be*] ?

In a borough divided into divisions, instead of the second question, the Redistribution of Seats Act, 1885, 48 & 49 Vict. c. 23, s. 13 (4), substitutes the following :—

Have you already voted here or elsewhere at this election for the borough of , either in this or any other division ?

Any person wilfully making a false answer to either of these questions is guilty of a misdemeanor. The returning officer or his deputy, or the presiding officer or any clerk appointed by the returning officer to attend a polling station, must, if required on behalf of any candidate, administer an oath to the voter in the following form :—

Form of Oath.

You do swear [*or* affirm, *as the case may be*] that you are the same person whose name appears as A. B. on the Register of Voters now in force for the county of [*or* for the riding, parts, *or* division of the county of], *or* for the city [*or* borough]

of [*as the case may be*], and that you have not before voted, either here or elsewhere, at the present election for the county of [*or* for the riding, parts, *or* division of the county of], *or* for the city [*or* borough] of [*as the case may be*].

"So help you God."

(See Parliamentary Registration Act, 1843, s. 81; Ballot Act, 1872, s. 10.)

As to who may administer the oath, see Ballot Act, 1872, s. 10. After duly answering the questions and taking the oath, the applicant is entitled to mark one of the tendered ballot papers in the same manner as any other voter may mark one of the ordinary ballot papers (Sched. 1, r. 27). Such tendered ballot paper is, however, instead of being put into the ballot-box, to be given to the presiding officer, and indorsed by him with the name of the voter and his number on the register of voters, and set aside in a separate packet, and is not to be counted by the returning officer. Where the applicant himself put the tendered vote into the ballot-box, instead of returning it to the presiding officer, in accordance with this rule, the vote was held bad (*Buckrose*, 1886, 4 O'M. & H. 115). The name of the voter and his number on the register are to be entered on a list, called the "Tendered Votes List" (Sched. 1, r. 27). Though the tendered vote is not to be counted by the returning officer, on a scrutiny it may be added, and, in the case of personation, the vote of the person guilty would be struck off (*Oldham*, 1869, 1 O'M. & H. 152; *St. Andrews*, 1886, 4 O'M. & H. 32; see also SCRUTINY); and it may be mentioned that the omission of the indorsement by the presiding officer will not prevent the vote from being counted on a scrutiny (*Stepney*, 1886, 4 O'M. & H. 43).

Any person applying for a ballot paper, under the Act, is deemed "to tender his vote" (see s. 15).

A returning officer is not entitled to reject any vote tendered by any person whose name is on the register of voters, except by reason of its appearing to the returning officer or his deputy, upon putting the above-mentioned questions, or either of them, that the person so claiming to vote is not the same person whose name appears on the register, or that he had previously voted at the same election, or where such person refuses to take the oath or make the affirmation (6 & 7 Vict. c. 18, s. 82).

As to actions against a returning officer for improperly rejecting a vote, see RETURNING OFFICER.

Duration of Poll.—The Elections (Hours of Poll) Act, 1885, 48 Vict. c. 10, s. 1, enacts that the poll shall commence at 8 A.M. and be kept open until 8 P.M. of the same day and no longer, but this does not apply to university elections. At the hour prescribed for the close of the poll the presiding officer and officials must refuse to supply a ballot paper to any applicant. The vote recorded on any ballot paper supplied to a voter after 8 P.M. is void, but any voter who has had a ballot paper delivered to him before that time is entitled to mark the paper and deposit it in the ballot-box before the ballot-box is closed and sealed, and such vote is valid even though it were recorded after 8 P.M. (*Islington*, 1901, 5 O'M. & H. 129).

Void Ballot Papers.—Under sec. 2 of the Ballot Act, a ballot paper is void and is not to be counted—(1) If it has not on its back the official mark (see *Wigtown*, 1874, 2 O'M. & H. 216; *Ackers* v. *Howard*, 1886, 16 Q. B. D. 753; *Cirencester*, 1893, Day's *El. Cas.* 155). Though the Act (s. 2) requires a ballot paper to be marked on both sides with the official mark, yet a ballot paper has been held not to be void because the mark does not appear on its face (*Ackers* v. *Howard*, 1886, 16 Q. B. D. 739; see also *Thornbury*, 1886, 4 O'M. & H. 65; and *Cirencester*, 1893, *supra*). The official mark, an instrument for which is to be provided by the returning officer, must be kept secret, and the same mark cannot be used again for the same county or borough for seven years (s. 4; Sched. 1, r. 20). The modern practice is to use a stamping instrument which perforates the ballot paper. (2) If votes are given on it to more candidates than the voter is entitled to vote for (see *Woodward* v. *Sarsons*, 1875, L. R. 10 C. P. 748; *Philipps* v. *Goff*, 1886, 17 Q. B. D. 814). (3) If anything, except the number on the back, is written or marked on it, by which the voter can be identified (see *Woodward* v. *Sarsons*, 1875, L. R. 10 C. P. 733; *Stepney*, 1886, 4 O'M. & H. 37, 38; *Buckrose*, *ibid.* 111; *Cirencester*, 1893, Day's *El. Cas.* 158). And under Sched. 1, r. 36, of the Act, a ballot paper which is unmarked or void for uncertainty is not to be counted (see *Berwick*, 1880, 3 O'M. & H. 182; *Stepney*, 1886, 4 O'M. & H. 37; *Buckrose*, 1886, *ibid.* 110-112; *Cirencester*, 1893, Day's *El. Cas.* 159); but the cases show that any mark, indicating with reasonable certainty an intention to vote for a particular candidate, is sufficient (see *Woodward* v. *Sarsons*, 1875, L. R. 10 C. P. 733; *Philipps* v. *Goff*, 1886, 17 Q. B. D. 805; *Wigtown*, 1874, 2 O'M & H. 229; *Berwick*, 1880, 3 O'M. & H. 180; *Buckrose*, 1886, 4 O'M. & H. 112; *Cirencester*, 1893, Day's *El. Cas.* 157).

Transmission of Ballot Papers to Returning Officer.—As soon as practicable after the close of the poll the presiding officer of each station must, in the presence of the agents of the candidates, make up into separate packets, sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals—(1) each ballot-box in use at his station, unopened, but with the key attached; (2) the unused and spoilt ballot papers placed together; (3) the tendered ballot papers; (4) the marked copies of the register of voters, and the counterfoils of the ballot papers; and (5) the tendered votes list, and the list of votes marked by the presiding officer, and a statement of the number of voters whose votes are marked by the presiding officer under the heads, "physical incapacity," "Jews," and "unable to read," and the declarations of inability to read; and must deliver these packets to the returning officer (Ballot Act, 1872, Sched. 1, r. 29). The packets must be accompanied by a statement made by the presiding officer showing the number of ballot papers entrusted to him, and accounting for them under the heads of ballot papers in the ballot-box, unused, spoilt, and tendered ballot papers, which statement is known as the *Ballot Paper Account* (*ibid.* r 30). As to the procedure on counting the votes, see ELECTIONS.

Custody of Ballot Papers after Election.—After the completion of the counting, in the case of parliamentary elections, the returning officer is required to seal up the ballot papers and other documents and transmit them to the Clerk of the Crown in Chancery (see Ballot Act, 1872, Sched. 1, rr. 36-38; as to the mode of transmission, see the Parliamentary Registration Act, 1843, 6 & 7 Vict. c. 18, s. 93), in whose custody they

remain for a year, after which they are destroyed, unless otherwise directed by order of the House of Commons or of the High Court (see Ballot Act, 1872, Sched. 1, r. 39). After they have been forwarded to the Clerk of the Crown, no one can inspect any rejected ballot papers, counterfoils, or counted ballot papers, except under the order of the House of Commons, or the High Court, or a judge at chambers, subject to such conditions as may be imposed in order to preserve the secrecy of the ballot (Sched. 1, rr. 40, 41; see also *Tyrone*, 1873, Ir. R. 7 C. L. 190; *Stowe* v. *Joliffe*, 1874, L. R. 9 C. P. 446). On the trial of an election petition the ballot papers are transmitted by the Clerk of the Crown to the registrar of the Court for the trial of the petition, by whom, after the conclusion of the trial, they are returned to the custody of the Clerk of the Crown. As to the production and inspection of ballot papers at a criminal trial, see *R.* v. *Bearsdall*, 1876, 1 Q. B. D. 452.

Recount.—As to recounting the ballot papers on petition in cases of alleged mistake in the counting, see RECOUNT.

Effect on Non-compliance with Ballot Act or Rules.—The whole system of election by ballot is in every detail regulated by the Ballot Act, 1872, and the rules and forms contained in the schedules to the Act. The cases show that the enactments of the Acts must be absolutely obeyed, but the rules and forms contained in the schedules are merely directory, and it is not essential to follow them in every detail, provided they be substantially obeyed (see *Thornbury*, 1889, 16 Q. B. D. 739; *Woodward* v. *Sarsons*, 1875, L. R. 10 C. P. 746; *Philipps* v. *Goff*, 1886, 17 Q. B. D. 812). Moreover, the Act itself provides (s. 13) that no election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule, or any mistake in the use of the forms in the second schedule, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake did not affect the result of the election (see also *Islington*, 1901, 5 O'M. & H. 125, *per* Kennedy, J.).

Secrecy of Ballot.—Stringent provisions are contained in the Act for the maintenance of the secrecy of the ballot by every officer, clerk, and agent in attendance at a polling station, or at the counting of the votes, and against the interference by any such person with the voter, or any attempt to procure information from him as to the candidate for whom he is about to vote or has voted (see s. 4).

Under rule 54 of the Ballot Act Rules, every returning officer, and every officer, clerk or agent authorised to attend at a polling station, or at the counting of the votes, must, before the opening of the poll, make a statutory declaration of secrecy, in the presence, if he is the returning officer, of a justice of the peace, and if he is any other officer or an agent, of a justice of the peace or of the returning officer. The form of statutory declaration, as given in Sched. 2 of the Act, is as follows:—

Form of Statutory Declaration of Secrecy.

I SOLEMNLY promise and declare, that I will not, at this election for , do anything forbidden by section four of the Ballot Act, 1872, which has been read to me.

NOTE.—*The section must be read to the declarant by the person taking the declaration.*

Ballot Offences.—Certain specific offences in respect of ballot papers and ballot-boxes are set forth in sec. 3 of the Act, which makes every person guilty of a misdemeanor and liable, if he is a returning officer or an officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour; and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour, who:—

(1) Forges or counterfeits or fraudulently defaces or fraudulently destroys any ballot paper or the official mark on any ballot paper; or

(2) Without due authority supplies any ballot paper to any person; or

(3) Fraudulently puts into any ballot-box any paper other than the ballot paper which he is authorised by law to put in; or

(4) Fraudulently takes out of the polling station any ballot paper; or

(5) Without due authority destroys, takes, opens, or otherwise interferes with any ballot-box or packet of ballot papers then in use for the purposes of the election.

Any attempt to commit any of the above offences is punishable in the manner in which the offence itself is punishable.

No Ballot at University Elections.—The provisions of the Ballot Act, with the exception of the provisions of Part III. relating to personation, do not apply to university elections (ss. 27, 31).

Continuance of Ballot Act.—The Act was to have expired in 1880 (s. 33); it has, however, been annually re-enacted by the Expiring Laws Continuance Act (see Expiring Laws Continuance Act, 1905, 5. Edw. VII. c. 21).

Municipal and other Elections.—As to the application of the Ballot Act to municipal elections, see Sched. 1, pt. 2, r. 64, of the Act, and the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, s. 58.

As to municipal elections in the City of London, see the City of London Ballot Act, 1887, 50 Vict. c. 13.

With regard to county council elections, the Local Government Act, 1888, 51 & 52 Vict. c. 41, ss. 2, 75, incorporates the provisions of the Municipal Corporations Act, 1882, 45 & 46 Vict. c. 50, under which the provisions of the Ballot Act are applicable, so far as circumstances admit.

The provisions of the Ballot Act are applied by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3), to parish council elections, and the other elections under that Act, subject, however, to the adaptations, alterations, and exceptions made by the rules framed under that Act by the Local Government Board. For these rules see the Election Orders issued from time to time by the Local Government Board.

As to metropolitan borough councils elections, see the London Government Act, 1899, 62 & 63 Vict. c. 14. Under the Metropolitan Borough Councillors Election Order, 1900, clause 21, the provisions of the Ballot Act, 1872, which, with adaptations and alterations, are set out in the fourth schedule to the order, and only such provisions of that Act, are, subject to such adaptations and alterations and to the provisions of the order, applied to the elections of metropolitan borough councillors in like manner as in the case of a municipal election.

For the provisions of the Ballot Act, with reference to the nomination of candidates, see NOMINATION.

Ballot-Box.—See BALLOT.

Ballot Papers.—See BALLOT.

Banc.—This term, which is derived from the Latin word *bancus*, means a bench or seat of justice, such as the Queen's Bench, or *Bancus Reginæ*, and it was extended to certain sittings of the judges in the Court in which such bench or seat was placed. Sittings *in banc* were, before the coming into operation of the Judicature Acts, held at Westminster by the judges of the King or Queen's Bench, the Common Pleas, and the Exchequer. See SUPREME COURT. These judges constituted the Court, and exercised not only a formal jurisdiction in regulating the proceedings in suits, but also a summary jurisdiction in dealing with matters brought before them by way of motion (Broom's *Commentaries*, 4th ed., p. 51). Such matters involved for the most part the decision of questions of law and applications for new trials, and included in the Court of Queen's Bench the direction and regulation of various criminal proceedings. The Court sitting *in banc* likewise decided special cases and demurrers (*q.v.*), and regulated the practice of the Courts. Formerly sittings *in banc* were confined to term time, and the *puisne* judges of each of the above-mentioned Courts sat by rotation in each term, or otherwise, as they agreed amongst themselves, so that no greater number than three of them sat at the same time *in banc* for the transaction of business in term, unless in the absence of the Lord Chief Justice or Lord Chief Baron (11 Geo. IV. and 1 Will. IV. c. 70, s. 1). By 1 & 2 Vict. c. 32, s. 1, power was, however, conferred on the judges of holding sittings *in banc* at the times appointed for holding sittings at Nisi Prius in London and Middlesex, and this power was further extended by sec. 95 of the Common Law Procedure Act, 1854, which provided that such sittings might be held at any time, or times, whether in term or vacation, not being between the 10th of August and the 24th of October. Sometimes also, when occasion required, one of the judges of the above-mentioned Courts, while the other judges of the same Court were sitting *in banc*, sat apart from them for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court to which he belonged, in the same manner and with the same force and validity as might be done by the Court sitting *in banc* (11 Geo. IV. and 1 Will IV. c. 70, s. 1). These last-mentioned sittings usually took place in what was called the Bail Court (*q.v.*). The business of the Court *in banc* was transferred by sec. 41 of the Judicature Act, 1873, to the Divisional Courts of the High Court of Justice, established under that Act, and these Courts are now constituted of two judges, or of such additional number as the President of the Division may think expedient (Appellate Jurisdiction Act, 1876, s. 17).

See APPEALS; DIVISIONAL COURTS.

Band of Music.—See ILLEGAL PRACTICES.

Bangor, University College of.—See WALES (UNIVERSITY OF).

Banishment.—Transportation, or banishment, was first inflicted as a punishment by Statute 39 Eliz. c. 4.

But the first Act of Parliament is 18 Car. II. c. 3, s. 2, by which certain offenders were to be sent to America; and, in subsequent Acts of the same reign, return before the expiration of the sentence was treated as felony. 4 Geo. I. c. 11, provides that, for criminals without benefit of clergy, the Crown in its mercy might prescribe transportation. 5 Geo. IV. c. 84, as amended by 11 Geo. IV. and 1 Will IV. c. 39, empowered the Crown to appoint places of confinement beyond seas. New South Wales, Van Diemen's Land, and Norfolk Island were the penal settlements; but the colonists objecting, 10 & 11 Vict. c. 67, appointed certain prisons in Great Britain in their place; and by 16 & 17 Vict. c. 99, penal servitude might be imposed if the sentence was under fourteen years. 20 & 21 Vict. c. 3, abolished transportation as a punishment, though the Secretary of State may still direct penal servitude beyond the seas (see Kerr, Blackstone, *Com.* iv. 409*n*). [There is power for the King in Council (under 32 & 33 Vict. c. 10, s. 4, and 47 & 48 Vict. c. 31, s. 16 (2)) to sanction an agreement between any two colonies for the removal of prisoners under sentence from one colony to another for purposes of punishment, and for the return of such prisoners to the former colony on the expiration of their sentence. See Stat. Rules and [Rev. Orders 1904], sub tit. "Colonial Prisoner."] See PENAL SERVITUDE; TRANSPORTATION.

Bank Books.—*Evidence.*

1. Entries in the books of the Bank of England may be proved by examined copies (*Mortimer* v. *M'Callam*, 1840, 6 Mee. & W. 58; 55 R. R. 503).

2. Proof of the books of other banks is facilitated by the Bankers' Books Evidence Act, 1879. "Bank" means in the Act a bank, which has duly made returns to the Commissioners of Inland Revenue (this fact is provable by affidavit or evidence of an officer of the bank, or a copy of the newspaper in which the returns are published); any certified or post office savings-bank; and (45 & 46 Vict. c. 72, s. 11) any banking company making returns to the Registrar of Joint-Stock Companies (this fact is provable by the certificate of the registrar or assistant-registrar). The Act makes copies of entries in the ordinary books of the bank *primâ facie* evidence both of the entries and of the matters thereby recorded, provided that the entries were made in the ordinary course, and the copies have been examined with the entries and are correct, and the books are in the custody of the bank. On the application of any party to legal proceedings, it may be ordered that the party shall have liberty to inspect and take copies of entries in a bank's books for the purposes of the litigation (s. 7). Such an order will be made wherever the applicant could before the Act have compelled the banker to attend at the hearing and produce his books (*Arnott* v. *Hayes*, 1887, 36 Ch. D. 731), and notwithstanding that the account to which the entries relate is kept in the name of a stranger, if the entries would be evidence against a party to the proceedings (*South Stafford Tramway Co.* v. *Ebbsmith*, [1895] 2 Q. B. 669). [But in the latter case the account must, as a rule, be in form or substance the account of one of the parties to the litigation (*Pollock* v. *Garle*, [1898] 1 Ch. 1).] It may be made *ex parte* (*Arnott* v. *Hayes*, *supra*). But no order will be made for the purpose of giving a party inspection before the trial which he would not have been entitled to upon discovery in the action (*S. C.*; *Parnell* v. *Wood*, [1892] Prob. 137; see also *Perry* v. *Phosphor Bronze Co.*, 1894, 71 L. T.

854). [The Court has jurisdiction in England to make an order relating to bankers' books in other divisions of the United Kingdom, *e.g.* Scotland (*Kissam* v. *Link*, [1896] 1 Q. B. 574).] See further the notes in the Annual Practice to Order 37, r. 7.

No banker or bank officer can be compelled to produce books, or to give evidence of the contents of books which may be proved by copies under the Act, in any proceedings to which the bank is not a party, unless by the order of a judge for special cause (s. 6).

Bank Holidays.—Easter Monday, the Monday in Whitsun week, the first Monday in August, and the 26th of December if a week-day, or if it is a Sunday the 27th (Holidays Extension Act, 1871), or any day appointed by Order in Council in place of one of these, and any day appointed by royal proclamation in addition to these, is a statutory bank holiday in England. All such days are to be kept as close holidays in all banks, and bills and notes payable on any such holiday are to be payable, or to be noted and protested, on the next following day. Notice of dishonour, presentation, and forwarding of bills and notes is in like manner to be given or made on the next following day. No person is compellable to make any payment or do any act on a statutory bank holiday which he would not be compellable to make or do on Christmas day or Good Friday (Bank Holidays Act, 1871). The four first-mentioned days are to be kept as public holidays in the Customs, Inland Revenue offices and bonded warehouses, and may, upon notice being given, be so kept in any docks (Holidays Extension Act, 1871). [See the Bank Holidays Act, 1871, and the Holidays Extension Act, 1875. Extended as to Ireland to the seventeenth day of every March when a week day, and if a Sunday, to the next day following, by 3 Ed. VII. c. 1.

By the Local Government Act, 1894, s. 73, "When the day on which anything is required by or in pursuance of this Act to be done on Sunday, Christmas day, or Good Friday, or a bank holiday, that thing shall be done on the next following day, not being one of the days above-mentioned."

Provision is made, by the Factory and Workshop Act, 1901, for bank holidays or another whole holiday, or two half-holidays in lieu, being compulsorily allowed to women, young persons and children.] See BUSINESS DAY; CHRISTMAS DAY; SUNDAY.

Bank-Note.—1. *Definition.*—A bank-note is the promissory note of a banker payable to bearer on demand. For the purposes of the Stamp Acts the name includes other instruments (see Stamp Act, 1854, s. 11; Stamp Act, 1891, s. 29).

2. *Issue.*—The privilege of issuing bank-notes in England belongs exclusively to the Bank of England, and such banks as were lawfully issuing their own notes in 1844 (see BANK OF ENGLAND). It is forbidden to issue Bank of England notes (7 Geo. IV. c. 6, s. 3), or to circulate in England, Scotch or Irish (9 Geo. IV. c. 56) notes of less value than £5.

3. *Legal Tender and Currency.*—Bank of England notes are legal tender in England for all sums above £5, except by the bank itself and its branches (Bank of England Act, 1833, s. 6). The notes are treated as cash, not as securities for money, and they pass by mere delivery (*Miller* v. *Race*, 1758, 1 Burr. 452; 1 Sm. L. C.); they form a contract

between the holder and the bank which is ambulatory, by mere passing from hand to hand (*Suffell* v. *Bank of England*, 1882, 9 Q. B. D. 555). The notes of a county bank are a good tender if not objected to at the time of tender (*Polglass* v. *Oliver*, 1831, 2 Cromp. & J. 15; 37 R. R. 623).

4. *Alteration.*—The alteration of a bank-note in a material particular, as its amount, date, or number, avoids the note (*Suffell* v. *Bank of England, supra*; see the notes to *Master* v. *Miller*, in 1 Sm. L. C., 2 R. R. 399). But in the case of notes, other than those of the Bank of England (*Leeds and County Bank* v. *Walker*, 1883, 11 Q. B. D. 84), the alteration, if it is not apparent, does not prejudice the title to payment of a holder in due course (S. C. and Bills of Exchange Act, 1882, s. 64).

5. *Forged and Stolen Notes.*—A forged note confers, of course, no title to payment against the bank. The payee of a forged note, or a note avoided by alteration, can recover the consideration he gave for it from the payer, as money paid in mistake of fact (*Jones* v. *Hyde*, 1814, 5 Taun. 488; 15 R. R. 561; Bills of Exchange Act, ss. 58 (3)). A stolen note, or a note obtained by fraud, being like cash (see above, 3), must be paid on presentation by the bank to any holder who is not shown to have come by it dishonestly (*Miller* v. *Race*, 1758, 1 Burr. 452; 1 Sm. L. C.), but the bank is entitled to delay payment of a stopped note for a reasonable time, in order to make inquiries (*Solomons* v. *Bank of England*, 1791, 13 East, 135; 12 R. R. 341). Negligence in taking a stolen note is not sufficient to disentitle the holder to payment (*Uther* v. *Rich*, 1839, 10 Ad. & E. 784; 50 R. R. 549), nor is forgetfulness of information regarding the note (*Raphael* v. *Bank of England*, 1855, 17 C. B. 161; Bills of Exchange Act, s. 90), but deliberate refusal to make inquiries, when the circumstances excite suspicion, may be sufficient evidence of bad faith (*Solomons* v. *Bank of England, supra*; *Jones* v. *Gordon*, 1877, 2 App. Cas. 616).

6. *Payment—Duty to Present.*—If notes (other than those of the Bank of England) are paid without indorsement, and are dishonoured, the payee cannot recover the consideration from the payer (Bills of Exchange Act, s. 58), unless there was an agreement or circumstances to show that the payment was to be conditional upon the notes being met, as if the notes were cashed to oblige the payer (*Turner* v. *Stones*, 1843, 1 Dow. & L. 122; 67 R. R. 846; and see *Timmins* v. *Gibbins*, 1852, 18 Q. B. 722), or were given for an antecedent debt (*q.v.*) (see *Guardians of Litchfield* v. *Greene*, 1857, 26 L. J. Ex. 140). And if the holder of the notes does not promptly present or circulate the notes, he cannot recover in any event (*S. C.*; *Camidge* v. *Allenby*, 1827, 6 Barn. & Cress. 373; 30 R. R. 358).

7. *Lost Notes.*—In any action upon a lost note the Court may order that the loss of the note shall not be set up, provided that an indemnity be given (Common Law Procedure Act, 1854, s. 87; Bills of Exchange Act, s. 70).

8. *Half Notes.*—If half a note be sent on first, for safety, the property in the whole remains in the sender, and he may demand the half back (*Smith* v. *Mundy*, 1860, 3 El. & El. 22). It is said the holder of one half, the other being lost, can recover from the bank without giving an indemnity (*Redmayne* v. *Burton*, 1860, 2 L. T. N. S. 324, *per* Willes).

Bank of England.—The "Governor and Company of the Bank of England" are a corporation instituted by letters-patent under

a special statute of 1694 (5 & 6 Will. & Mary, c. 20). For the early history of the Bank, see *Bank of England* v. *Anderson*, 1837, 3 Bing. N. C. 589; 44 R. R. 271. It is now chiefly regulated by the Bank of England Act, 1833 (B. A. 1833), and the Bank Charter Act, 1844 (B. C. A. 1844). The Bank Act, 1892, provides for the grant of a supplementary charter to regulate the internal affairs of the Bank. Until redemption by the repayment of its loans to the Government (B. A. 1833, s. 14), the Bank enjoys a monopoly in regard to the issue of bank-notes, and dealing as bankers in bills of exchange payable to bearer on demand. The monopoly was formerly very extensive (see the case cited *supra*, and 39 & 40 Geo. III. c. 28), but it has been much curtailed by modern statutes. Its present extent is shown by the following restrictions. No other bank or banker, except a bank or banker who on the 6th of May 1844 was lawfully issuing its or his own notes, and who has done so continuously since that date (B. C. A. 1844, s. 12), may make or issue bank-notes in any part of the United Kingdom (B. C. A. 1844, ss. 10, 12 and 28), or take up money upon its, or his, bills, payable to bearer (s. 11). And the excepted banks and bankers are limited to the average amounts of these issues in October 1844 (s. 19). Before May 1844, banking firms of not more than six members might, upon obtaining licences under the Bank Note Act, 1828, s. 1, issue notes at places not in the City of London, or within three miles of it; and banking firms of more than six members, having no branch in London, might issue notes at places not within sixty-five miles of London (39 & 40 Geo. III. c. 28, s. 15; B. A. 1833, ss. 2 and 3; B. C. A. 1844, s. 26). The rights of establishing banking firms secured by the Bank Charter Act, 1844, are not affected by subsequent changes of membership, provided that where their privileges depended upon their having not more than six members, that number is not exceeded (B. A. 1844, s. 11). But an old bank of issue may, under the Act 20 & 21 Vict. c. 49, s. 12 (probably), now increase its membership to ten, without losing the right to issue notes at places more than three miles from the City of London. If an old bank of issue assigns to a limited company the profits and management of its note issue, its privilege is lost (*A.-G.* v. *Birkbeck*, 1884, 12 Q. B. D. 605; see also *Prescott & Co.* v. *Bank of England*, [1894] 1 Q. B. 351). The Bank of England is forbidden to trade in goods (5 & 6 Will. & Mary, c. 20, ss. 27 and 28), and it is required to buy all gold bullion offered in exchange for its notes, at the price of £3, 17s. 9d. per ounce of standard gold. As to judgments against the Bank, see 5 & 6 Will. & Mary, c. 20, s. 31; and 8 & 9 Will. III. c. 20, s. 45.

The issue department was separated from the general banking department in 1844, and the value of the notes of the Bank in circulation is restricted to the amount of the securities then deposited with the issue department, namely, £14,000,000 (B. C. A. 1844, s. 1), subject to increase upon the withdrawal of the notes of other banks of issue (s. 5). One quarter of the cash and bullion held against notes may be silver (s. 3). The issue department is required to publish weekly accounts (s. 6). The bank was empowered by the Country Bankers Act, 1826, s. 15, to open and carry on branch banks, all notes issued at such branches being payable in coin at the branches as well as in London.

The Bank manages the banking business connected with the national debt and the transfer of government securities (National Debt Act,

1870); and see NATIONAL DEBT; Anson on *The Constitution*, part ii. pp. 307-332; and as to payment of dividends by warrants, the National Debt Act, 1889, s. 4; Exchequer Bonds and Bills, 29 & 30 Vict. c. 22, s. 30, and Treasury Bills, 40 & 41 Vict. c. 2, s. 13). It holds the funds in Court (see FUNDS IN COURT, and 35 & 36 Vict. c. 44).

As to the duty of the Bank in relation to transfers of stock, see *Humberstone* v. *Chase*, 1836, 2 Y. & C. Ex. 209 (the Bank is only liable as a bailee); *Prosser* v. *Bank of England*, 1872, L. R. 13 Eq. 611 (evidence of title must satisfy the Bank); as to the transfer of companies transferable in the books of the Bank, see 33 & 34 Vict. c. 71, s. 73; and see DISTRINGAS. The Bank must, upon notice, obey orders of Court made under the Trustee Act, 1893, s. 35 (4), or under the Lunacy Acts (see *In re Browne*, [1894] 3 Ch. 412, and *In re Shortridge*, [1895] 1 Ch. 278). It is not bound to show its register of stock-holders to anyone who cannot show that he has a *bonâ fide* interest in some unclaimed stock (*R.* v. *Bank of England*, [1891] 1 Q. B. 785). See BANKS; BANK BOOKS; BANK-NOTE; BANK SHARES; and BANKER AND CUSTOMER.

Bank Shares.—All contracts for the sale and purchase or transfer of any shares or stock, or other interests in a joint-stock banking company, are void, unless they set forth in writing the distinctive numbers of the shares, stock, or interests, or, if there are no such numbers, the names of the registered holders. It is a misdemeanor to insert false numbers or names in such contracts (Leeman's Act, 30 Vict. c. 29, s. 1). The lists of bank shareholders must be shown to registered shareholders (*ibid.* s. 2). The provisions of this Act as to inserting numbers, etc., are regularly disregarded on the Stock Exchange, but the custom to do so is illegal and unreasonable (*Neilson* v. *James*, 1882, 9 Q. B. D. 546); possibly it may be binding upon principals of a stock-broker who know of it when they employ him (*Perry* v. *Barnett*, 1885, 15 Q. B. D. 388). See further, *Loring* v. *Davis*, 1886, 32 Ch. D. 625, and *Mitchell* v. *Glasgow Bank*, 1877, 4 App. Cas. 624.

Bank Stock.—See STOCK.

Banker and Customer.—1. *Relationship.*—The bank is a debtor to the customer (*Foley* v. *Hill*, 1848, 2 H. L. C. 28; 9 E. R. 1002; *Robarts* v. *Tucker*, 1851, 16 Q. B. 560; *Webb* v. *Derbyshire*, [1906] 1 Ch. 135), not a bailee or a trustee (*Ex parte Waring*, 1866, 36 L. J. Ch. 151), in respect of money deposited with it, and not actually appropriated to a particular purpose (*Farley* v. *Turner*, 1857, 26 L. J. Ch. 710) (as to property deposited for safe keeping, see below, 6). And the relationship is still that of debtor and creditor if the customer has overdrawn (*Cunliffe Brooks* v. *Blackburn Benefit Society*, 1884, 9 App. Cas. 857). It follows that upon bankruptcy the customer has merely a right of proof in respect of his current or deposit accounts (*Re Barned's Bank*, 1870, 39 L. J. Ch. 635).

2. *Forged Bills and Cheques.*—It follows that the bank can only be discharged by payments made to the customer, his agent, or principal (*Sims* v. *Bond*, 1833, 5 Barn. & Adol. 389; 39 R. R. 511), or to someone who by mercantile law can give a good discharge (*Robarts* v. *Tucker*, *supra*). So, if the bank pays the holder of a forged acceptance, or of a real acceptance of the customer to which the holder makes title through a forged indorsement, it cannot charge the customer's account (*s. c.*).

The customer may be estopped from denying that the indorsement is good (*s. c.*), *e.g.* if his negligence was the direct and proximate cause of the payment being made. Negligence in the custody of its seal by a corporation is not such cause (*Staple of England* v. *Bank of England*, 1887, 21 Q. B. D. 160). See *Bank of England* v. *Vagliano*, [1891] App. Cas. 107, where the customer sent letters of advice to the bank to meet the forged bills, and several of the Law Lords (but not a majority) regarded this as sufficient to entitle the bank to judgment. The customer's acceptance is a warranty of the genuineness of the drawee's signature only (*S. C.;* Bill of Exchange Act, 1882, s. 54 (2)). But the mere fact that the forged indorsement is on the bill before acceptance by the customer, at any rate unless the fact is known to the bank, does not enable the bank to charge the customer (*Robarts* v. *Tucker*, *supra*), nor does the acceptance of a bill so drawn as to be easily altered (*Scholfield* v. *Londesborough*, [1895] 1 Q. B. 536; [1896] App. Cas. 514). A bill to the order of a non-existent person, or one who is not intended by the drawer to have anything to do with it (*Bank of England* v. *Vagliano*, *supra*), is, in effect, a bill to bearer (Bills of Exchange Act, s. 7 (3)), and may be paid by the bank from its customer's money (*s. c.*, [and *Clutton* v. *Attenborough*, [1897] A. C. 90]); and so may an altered bill, if the alteration is not apparent (Bills of Exchange Act, s. 64 (1)). [Contrast *Vinden* v. *Hughes*, [1905] 1 K. B. 795.] The bank can recover from the holder of a forged bill the money paid to him, if either he did not demand payment in good faith (*Martin* v. *Morgan*, 1819, 1 Brod. & B. 289; 21 R. R. 603), or the bank paid without negligence and claimed repayment before the payee had altered his position (*London and River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7; [*Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49]; see Chalmers on *Bills of Exchange*, 6th ed., p. 211). If the customer, being in exclusive knowledge of a forgery affecting a bill which the bank has paid on his account, withholds the knowledge from the bank until its chance of recovering the money is materially prejudiced, he will be estopped from objecting to be charged with the money (see *Ogilvie* v. *West Australian Corporation*, [1896] App. Cas. 257). Crossed cheques constitute an exception to the bank's liability (see CHEQUE). If a bill is drawn upon a bank payable to order on demand, and the bank upon which it is drawn pays it in good faith, and in the ordinary course, the bank can charge its customer, although the indorsement was a forgery (Bills of Exchange Act, s. 60).

3. *Accounts, Pass-Book, Appropriation.*—The customer's pass-book is evidence against him of the matters entered in it, if it has been sent to him in the ordinary course (see *Clayton's Case*, 1816, 1 Mer. 530; 35 E. R. 781; 15 R. R. 161; *Commercial Bank* v. *Rhind*, 1860, 3 Macq. H. L. 643). [But see the subject discussed at length in Paget's *Law of Banking* (1904), ch. xii.; and cf. *Gaden* v. *Newfoundland Bank*, 1899, A. C., at p. 286.] The bank may show entries in the pass-book to have been made by mistake (L. C.), subject to any estoppel arising from the fact that the customer has altered his position upon the faith of the entries (see *Skyring* v. *Greenwood*, 1825, 4 Barn. & Cress. 281; 28 R. R. 264; but *quære;* see also ESTOPPEL). Payments to and drawings upon current account are taken to be set off against each other automatically, the earliest drawing against the earliest payment, and so on (the "rule in *Clayton's Case*"). This rule does not apply as between *cestui-que trust*

and creditors of the customer so as to give the creditors the benefit of payments of the trust moneys (*In re Hallet's Estate*, 1880, 13 Ch. D. 696), but does apply in cases of conflict between claimants to moneys paid out of different trust funds (*Wood* v. *Stenning*, [1895] 2 Ch. 433). The bank may treat all a customer's personal accounts as one (*In re European Bank*, 1872, L. R. 8 Ch. 41), but may not use the balance of an account, as to which it has notice that it is not a personal account, to meet a deficiency on a personal account (*Ex parte Kingston*, 1871, L. R. 6 Ch. 632). [Cf. *Union Bank of Australia* v. *Murray-Aynsley*, [1898] A. C. 693; *Shields* v. *Bank of Ireland*, 1901, 1 Ir. R. 222; and *Bank of N. S. W.* v. *Goulburn, etc., Co.*, [1902] A. C. 543.] On the death of a surety for a current account, it is common practice for the bank to close the account and open a fresh one with the customer. This prevents the surety's estate getting the benefit of subsequent payments to current account by the customer (*In re Sherry*, 1884, 25 Ch. D. 692). As to what dealings with a firm's account discharge a retired partner from liability for an old overdraft, see *Rouse* v. *Bradford Bank*, [1894] App. Cas. 586.

4. *Duty of Banker.*—The bank must pay its customer's cheque, if it has funds sufficient to meet the cheque, on presentation (*Marzetti* v. *Williams*, 1830, 1 Barn. & Adol. 415; 35 R. R. 329). [Substantial damages may be given for dishonouring a customer's cheque, even though special damage be inadmissible (*Fleming* v. *Bank of New Zealand*, [1900] A. C. 577).] The bank must pay in the order of presentation of the cheque (*Kilsby* v. *Williams*, 1822, 1 Barn. & Ald. 815; 24 R. R. 564), unless the bank has notice of the death of the customer or of a countermand of payment by him (Bills of Exchange Act, s. 75). [In *Marzetti* v. *Williams, supra*, and *Robarts* v. *Tucker, infra*, it is said that the banker is entitled to a reasonable time to satisfy himself of the genuineness of the signature to a cheque or bill of exchange. But in *Bank of England* v. *Vagliano Brothers*, [1891] A. C., at p. 157, Lord Macnaghten expressly lays it down that bankers who undertake the duty of paying their customers' acceptances must pay off-hand, and this reasoning would seem to apply equally to cheques.] Cheques drawn on a branch bank are payable there only (*Prince* v. *Oriental Bank*, 1878, 3 App. Cas. 325). The bank is not bound to pay bills accepted by the customer and made payable at the bank (*Robarts* v. *Tucker, supra*), but may do so (*Kymer* v. *Laurie*, 1849, 18 L. J. Q. B. 218); or to accept bills drawn upon it, in the absence of special agreement to do so, but such agreement may be inferred from the bank having accepted previous bills and having funds to meet the bill in question (see *Cumming* v. *Shand*, 1860, 29 L. J. Ex. 129). If money is paid the bank, with its assent, to meet a bill, it may be sued by the holder (see *De Bernales* v. *Fuller*, as stated in 3 App. Cas., at p. 334).

The bank must keep the customer's affairs secret, unless it has a reasonable cause for disclosing them (*Hardy* v. *Veasey*, 1868, L. R. 3 Ex. 107), as, if the banker be examined in a winding-up (*In re Smith*, 1869, L. R. 4 Ch. 421), or called as a witness (*Lloyd* v. *Freshfield*, 1826, 2 Car. & P. 325).

[A bank contracting for valuable consideration, with a customer's agent or a third party, to honour the customer's outstanding cheques, is liable to be sued *by the customer* for breach of contract in the event of the specified cheques being subsequently dishonoured (*Fleming* v. *Bank of New Zealand*, [1900] A. C. 577).]

5. *Lien and Pledge.*—The bank has, in the absence of any inconsistent special agreement (*In re Bowes*, 1886, 33 Ch. D. 586), a general lien for all that is due to it from the customer. The lien extends to all the securities and moneys of the customer in its hands which have not been deposited for a particular purpose (*Davis* v. *Bowsher*, 1794, 5 T. R. 488; 2 R. R. 650; *Brandao* v. *Barnett*, 1846, 12 Cl. & Fin. 787; 8 E. R. 1622; 69 R. R. 204), but not to property merely deposited for safe keeping (*Brandao* v. *Barnett*; *Leese* v. *Martin*, 1873, L. R. 17 Eq. 224). [In *In re London and Globe Finance Corporation*, [1902] 2 Ch. 416, it was held that securities deposited with brokers, as cover for specific advances, but left in the brokers' hands after repayment, became liable to the general lien.] Neither the general lien (*Jeffreys* v. *Agra Bank*, 1866, L. R. 2 Eq. 674) nor an express charge can extend to further advances made after notice that the property sought to be charged belongs, or is mortgaged, to a third person (*London and County Bank* v. *Ratcliff*, 1881, 6 App. Cas. 722; *Bradford Banking Co.* v. *Briggs*, 1886, 12 App. Cas. 29). Pledges of negotiable securities, or securities treated by the market as negotiable, (*Bentinck* v. *London Joint-Stock Bank*, [1893] 2 Ch. 120), to a bank, which lends money upon the faith of them, *bonâ fide* and without notice that they are the property of a third person, pledged without his authority, can be held as security by the bank against the owner, and this notwithstanding that the securities are pledged in a block by a broker who in the common course is known to hold securities belonging to his principals (*London Joint-Stock Bank* v. *Simmonds*, [1892] App. Cas. 201). The same rule applies to the proceeds of a cheque carried by the bank to the broker's account (*Thompson* v. *Clydesdale Bank*, [1893] App. Cas. 282).

The bank is entitled to realise its securities (*Donald* v. *Suckling*, 1870, L. R. 1 Q. B., at p. 604). [The method of realisation depends on the nature of the securities and the contract made at the time of deposit. A mere lien carries with it no right of sale (*Donald* v. *Suckling*, *supra*, at p. 612). A pledge enables the pledgee to sell on default in payment after notice to the pledgor (*Deverges* v. *Sandeman*, [1902] 1 Ch., at p. 593, and authorities there cited). Again, the Court may treat a mere deposit, *e.g.* of share certificates, as a mortgage, and foreclosure may be obtained (*Harrold* v. *Plenty*, [1901] 2 Ch. 14). In *Brandao* v. *Barnett*, *supra*, Lord Campbell says, "the right acquired by a general lien is an implied pledge," and a banker's lien is usually so treated.]

6. *Deposited Property.*—The bank is a mere bailee of property deposited for safe keeping by the customer, and if it receives no special remuneration for allowing the deposit, it is not liable for loss by the theft of a bank servant, provided that it took such care as a reasonable man would take of his own property (*Gibbin* v. *M'Mullen*, 1869, L. R. 2 P. C. 318; 16 E. R. 578, and cases noted at end of latter report); but if a commission is paid to it, a higher degree of care is required (*In re United Service Co.*, 1870, L. R. 6 Ch. 212). See BAILMENTS.

7. *Branches and Correspondents.*—Branch banks are merely agencies of the principal, although treated as distinct banks for purposes of notice of dishonour and payment of cheques (*Prince* v. *Oriental Bank*, 1878, 3 App. Cas. 325; *London City, etc., Bank* v. *Gordon*, [1903] A. C. 240), so that accounts kept at different branches may be consolidated by the bank (*S. C.*; *Garnett* v. *M'Kewan*, 1872, L. R. 8 Ex. 10). If a correspondent bank collects moneys for a bank upon its customer's account, the bank is

liable for the receipts, for the correspondent is not the customer's agent but the bank's (*MacKersy* v. *Ramsay*, 1843, 9 Cl. & Fin. 818; 8 E. R. 628; 57 R. R. 183).

8. *Change of Banking Firm.*—The transfer of money from deposit to current account is equivalent to drawing out the money and paying it in again, so as to discharge the liability of a retired partner in the bank (*Head* v. *Head* (No. 2), [1894] 2 Ch. 236); but accepting a new deposit note is not a novation which effects such a discharge (*Head* v. *Head* (No. 1), [1893] 3 Ch. 426).

See CHEQUE; LETTER OF CREDIT; CIRCULAR NOTE. See also Hart's *Law of Banking* (1904); Paget (1904).

Banks and Banker.—As to the privileges of the Bank of England in regard to the issue of notes and dealing in bills payable to bearer on demand, see BANK OF ENGLAND.

The Companies Act, 1862, s. 4, prohibits any company or partnership of more than ten persons, to be formed after the 7th August 1862, for the purpose of carrying on the business of banking, unless it is formed under the Act, or under some other Act of Parliament, or under letters-patent. The Act permits existing banking companies or partnerships to register under it (s. 188; Companies Act, 1874, ss. 4 and 10). Companies so registered must publish half-yearly statements of their capital, shares issued, and calls made, liabilities and assets (s. 44), and must have their accounts audited half-yearly (Companies Act, 1879, ss. 7 and 8). A bank of issue registered under the Companies Acts remains unlimited as to the liability of its members in respect of its notes (Companies Act, 1879, s. 6). As to the declaration of dividends by a banking company, see *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198.

A number of earlier statutes are still in force, under which some existing joint-stock banks were provided, and by which they are still governed (see Walker on *Banking Law*), but the most of the larger banks, after the failure of the City of Glasgow Bank, registered under the Act of 1879. The Acts in general enable the banks to sue and be sued in the name of their public officers (County Bankers Act, 1826, s. 9; 1 & 2 Vict. c. 96; 7 & 8 Vict. c. 113, s. 47).

Bankers and banking companies are required once every year to make a return of the name, residence, and occupation of every member of the firm (Bank Charter Act, 1844, s. 21), unless they make returns of their shareholders to the Registrar of Joint-Stock Companies (45 & 46 Vict. c. 72, s. 11); and all banks of issue are required to make weekly returns of their notes in circulation (Bank Charter Act, 1844, s. 18). As to embezzlement of money or securities intrusted to a banker for a specific purpose, and the conversion to his own use by a banker of property intrusted to him for safe custody, see [the Larceny Act, 1901, which deals with fraudulent conversion of property generally, and repeals ss. 75 and 76 of the Larceny Act, 1861, which applied specially to bankers]. See also BANK BOOKS; BANK HOLIDAYS; BANK SHARES; and BANKER AND CUSTOMER.

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